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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 604

MARK GRAVES, JOHN P. HENNESSEY AND JOSEPH M. MESNIG, AS COMMISSIONERS, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

vs.

CARL J. SCHMIDLAPP AND ELIZABETH E. GORRIE, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EUGENE V. R. THAYER, DECEASED

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1941.

CERTIORARI GRANTED OCTOBER 27, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 22, 1941.

—7949

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of The Appraisal Under the Estate Tax Law of the Estate of Eugene V. R. Thayer, Deceased

State Tax Commission, Appellant,

Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors, Respondents

Statement Under Rule 234, Civil Practice Act

This is an appeal by the State Tax Commission from the order made and entered herein in the above entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York on the 17th day of October, 1939, which order affirmed an order theretofore made and entered herein on the 1st day of December, 1938, fixing and assessing an estate tax in the estate of the decedent herein under Article 10-C of the Tax Law.

The State Tax Commission's notice of appeal was served on the attorney for the executors on the 14th day of November, 1939.

Elizabeth E. Gorrie and Carl J. Schmidlapp, qualified as [fol. 2] executors on the 16th day of January, 1937 and are still acting as such and are the respondents herein, and Willard A. Mitchell, Esq. has been their attorney throughout the proceedings and still is their attorney. The State Tax Commission is represented by Jerome M. Hirsch, Esq. There has been no change of parties since the commencement of the said proceedings.

In Surrogate's Court—New York County

P-121-1937

In the Matter of The Appraisal under the Estate Tax Law of the Estate of Eugene V. R. Thayer, Deceased

Notice of Appeal to the Appellate Division

Sirs:

Please Take Notice that the State Tax Commission of the State of New York hereby appeals to the Appellate Division

of the Supreme Court of the State of New York, for the First Department, from the order made and entered in the above entitled proceeding, in the Office of the Clerk of the Surrogate's Court of the County of New York, on the 17th day of October, 1939, which order affirmed an order theretofore made and entered herein on the 1st day of December, [fol. 3] 1938, fixing and assessing an Estate Tax in the estate of the decedent herein, under Article 10-C of the Tax Law; and said appellant hereby appeals from each and every part of said order of October 17th, 1939.

Dated: New York, N. Y., November 13th, 1939.

Yours, etc., Jerome M. Hirsch, Attorney for State Tax Commission, Office and P. O. Address, 80 Centre Street, New York, N. Y.

To Willard A. Mitchell, Attorney for Executors, Office and P. O. Address, 141 Broadway, New York, N. Y.

[fol. 4] In Surrogate's Court for New York County

Present: Hon. James A. Foley, Surrogate.

Order Dismissing Appeal From Order Assessing Estate Tax. P-121-1937

In the Matter of The Appraisal under the Estate Tax Law of the Estate of Eugene V. R. Thayer, Deceased

Order Appealed From—October 17, 1939

An order having been made on the 1st day of December, 1938, upon the report of Jacob Manicoff, Esq., Appraiser, assessing, fixing and determining the amount of the Estate Tax to which the estate of said Eugene V. R. Thayer, deceased, is liable, at the some of $188,109.92;

And on or about the 17th day of January, 1939, the State Tax Commission having duly appealed to this Court from the order made as aforesaid, upon the following grounds:

(1) That the said order which assessed the tax against the above estate is erroneous, by reason of the fact that the report of the Appraiser, upon which said order is based, failed to include in the decedent's gross estate the value [fol. 5] of property passing under the exercise by the deced-

ent of a power of appointment, referred to in Schedule F of the executor's return.

(2) That the value of property passing under the exercise by the decedent of a power of appointment referred to in Schedule F of the executor's return is properly includible in the gross estate of this decedent for the purpose of the estate tax imposed by Article 10-C of the Tax Law of the State of New York.

And the said appeal having been duly brought before this Court for determination on or about the 27th day of June, 1939;

And Jerome M. Hirsch, Esq., having appeared for the said Appellant, the State Tax Commission, and Willard A. Mitchell, Esq., having appeared for the Respondents, Elizabeth E. Gorrie and Carl J. Schmidlapp as Executors of the Last Will and Testament of the above-named decedent;

And the Court having considered the said report of the Appraiser, Jacob Manicoff, Esq., and the records and evidence upon which the said report was based, and counsel for the Appellant and for the Respondents having been heard and due deliberation having been had,

Now, on motion of Willard A. Mitchell, Esq., attorney for the said Executors, it is

Ordered and Decreed that the said appeal be and the same hereby is denied, and it is further

[fol. 6] Ordered and Decreed that the order made herein as aforesaid on the 1st day of December, 1938, assessing, fixing and determining the amount of the said Estate Tax at $188,108.92, be and the same hereby is in all things confirmed.

J. A. F., Surrogate.

IN SURROGATE'S COURT—NEW YORK COUNTY

In the Matter of The Appraisal under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased

NOTICE OF APPEAL TO SURROGATE

SIRS:

Please Take Notice that the State Tax Commission hereby appeals to the Surrogate of New York County from the

order and determination of said Surrogate, entered herein on the 1st day of December, 1938, upon the following grounds:

(1) That the said order which assessed the tax against the above estate is erroneous, by reason of the fact that the report of the Appraiser, upon which said order is based, failed to include in the decedent's gross estate, the value of [fol. 7] property passing under the exercise by the decedent of a power of appointment, referred to in Schedule F of the executor's return.

(2) That the value of property passing under the exercise by the decedent of power of appointment referred to in Schedule F of the executor's return is properly includible in the gross estate of this decedent for the purpose of the estate tax imposed by Article 10-C of the Tax Law of the State of New York.

Dated, New York, N. Y., January 17, 1939.

Jerome M. Hirsch, Attorney for State Tax Commission, Office and Post Office Address, 80 Centre Street, New York, N. Y.

To: Willard A. Mitchell, Esq., Attorney for Executor, 141 Broadway, New York, N. Y.; George Loesch, Esq., Clerk of Surrogate's Court, New York, N. Y.

[fol. 8] In Surrogate's Court for New York County

Present: Hon. James A. Delehanty, Surrogate

P. 121-1937. Order Assessing Tax

In the Matter of the Appraisal of the Estate of Eugene V. R. Thayer, Deceased

Pro Forma Order—December 1, 1938

On reading the report filed the 30th day of November, 1938, of Jacob Manicoff, Esq., the appraiser appointed by order of this Court, dated the 3rd day of March, 1938, and it appearing that the said decedent died on the 1st day of January, 1937, it is

Ordered and Adjudged that the market value of the gross estate of said decedent at the time of death, the amount of

exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable, shall be and the same hereby is assessed, fixed and determined as follows:

Gross estate	$3,100,264.97
Total deductions allowed by statute	$ 458,365.66
Net estate	$2,641,899.31
[fol. 9] Tax on net estate not in excess of $150,000 less $100,000 exemptions allowed under Section 249-q	$ 500.00
Tax on net estate in excess of $150,000	$ 187,608.92
Total Tax	$ 188,108.92

James A. Delehanty, Surrogate.

IN SURROGATE'S COURT, COUNTY OF NEW YORK

js:ks.

In the Matter of the Appraisal, Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased

REPORT OF APPRAISER

To the Surrogate's Court of the County of New York:

I, Jacob Manicoff, Estate Tax Appraiser, having been designated by Hon. James A. Delehanty, Surrogate of the County of New York, by an order duly made and entered on the 3rd day of March, 1938, to appraise the estate of the [fol. 10] above-named decedent, pursuant to the provisions of the Law imposing a tax on estates of residents and non-residents, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 249-v of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 21st day of November, 1938, at the Office of the Estate Tax Appraiser for the County of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same and having given due consideration to the affidavits and other papers submitted

herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First. I report that the decedent herein died a resident of the State of New York on the 1st day of January, 1937, leaving a Last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by this Court on the — day of ——, 19—, and that thereafter on the 16th day of January, 1937, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to

Elizabeth E. Gorrie, 1148 Fifth Avenue, New York City; Carl J. Schmidlapp, Mill Neck, Nassau Co. L. I. N. Y., As Executors.

[fol. 11] Second. I further report the following appearances in this proceeding:

Jerome M. Hirsch, Esq., Attorney for State Tax Commission, 80 Centre Street, New York City.

Willard A. Mitchell, Esq., Attorney for Executors, 141 Broadway, New York City.

Third. I further report that I found the property comprising the gross estate of the decedent herein to consist of the items set forth in the annexed affidavit for appraisal, and that the fair market value of each of the said items at the date of decedent's death is the amount set down by me opposite such item in the column designated "Value as appraised in this proceeding," and that the sums properly to be allowed as deductions herein for the purpose of determining the net estate are the amounts set down by me after the several items claimed in the column designated "Allowed in this proceeding," as a result of which I find the said gross estate and deductions to be shown in the following summary:

Assets:

Schedule A—Real Estate	$ 00
Schedule B—Stocks and Bonds	1,196,391.87
Schedule C—Mortgages, Notes, Cash and Insurance	1,402,598.57
Schedule D-1—Jointly Owned Property	0
Schedule D-2—Other Miscellaneous Property	501,274.53

[fol. 12] Schedule E—Transfers		0
Schedule F—Powers of Appointment		0
Schedule G-1—Property Identified as Previously Taxed		0
Gross Estate		$3,100,264.97
Subject to Deductions as follows:		
Schedule G-2—Property Identified as Previously Taxed	$ 0	
Schedule H—Funeral and Administration Expenses	179,106.42	
Schedule I—Debts	274,259.24	
Schedule J—Mortgages, Net Losses, and Support of Dependents	0	
Schedule K—Charitable, Public, and Similar Gifts and quests	5,000.00	
Total Deductions		$ 458,365.66
The Net Estate, I Appraise at		$2,641,899.31

Fourth. I further report that the decedent died a nonresident of this State and that the total valuation of real property situated and tangible personal property having an actual situs within this State is $—— (This paragraph applies only if the decedent was in fact a nonresident as shown in paragraph 1.)

[fol. 13] Fifth. I further report the amount of exemptions allowed under § 249-q to be:

Beneficiaries	*Relationship*	*Amount of Exemption*
Frederic Henry Prince	Stepson	$ 5,000.00
Elizabeth Harding Thayer	Widow	20,000.00
Insurance		75,000.00
Total Exemptions		$100,000.00

Respectfully submitted, Jacob Manicoff, Appraiser.

Dated: New York, N. Y., Nov. 30, 1938.

Schedule F.

Powers of Appointment.

1.	$100,000.	St. Louis-San Francisco Railway Co. Consolidated 4½% Bonds, due 1978 (Certificate of Deposit) Interest in default. Listed NYSE. at 28⅞	$ 28,875.00
2.	25,000.	Western Union Telegraph Company Thirty-Year 5% Bonds, due 1960. Interest payable March and September 1st. Listed NYSE. At 108	27,000.00
		Interest accrued to date of death (N. Y. Corporation)	416.66
3.	800 shs.	American Machine & Foundry Company Capital stock. No par value. Listed NYSE. At 23¾ (N. J. Corp.)	19,000.00
[fol. 14]			
4.	1250 shs.	American Telephone & Telegraph Co. Capital Stock. Par value $100. Listed NYSE. At 184⅞, ex-div	231,093.75
		Dividend declared prior to death (N. Y. Corp.)	2,812.50
5.	1260 shs.	Bankers & Shippers Insurance Co. Par value $25. Unlisted. Inc. in New York. At 103	129,780.00
6.	3037 shs.	The Chase National Bank of the City of New York. Par value $12.55. Unlisted. At 49	148,813.00
7.	100 shs.	Chicago, Wilmington & Franklin Coal Co. Pfd. stock. Par value $100. Unlisted. Inc. in Mass. at 80	8,000.00
8.	80 shs.	Collins & Aikman Co. Preferred stock. Par value $100. Listed NYSE. Inc. in Delaware at 112¾	9,020.00
9.	200 shs.	Container Corporation of America Par value 20. Listed NYSE. At 21	4,200.00
10.	1323 shs.	Copper Range Co. Capital Stock. No par value. Listed NY Curb Exch. At 12½	16,537.50
11.	500 shs.	Creole Petroleum Co. Par value $5. Listed NY Curb Exch. at 37½	18,750.00
12.	425 shs.	Horders, Inc. stock. No par value. Listed NY Curb Exch. At 13½	5,737.50
13.	14 shs.	Inter-State National Bank (Kansas City) Par value $100. Unlisted. Missouri corp. at 320	4,480.00
		Dividend declared prior to death	112.00
14.	658 shs.	Kansas City Stock Yards Co. Com. stock. Par value $100. Unlisted. Inc. in Maine. At 77½	50,995.00
15.	100 shs.	Liggett & Myers Tobacco Co. Class "B" stock. Par value $25. Listed NYSE. Inc. in New Jersey. At 108¼	10,825.00
[fol. 15]			
16.	100 shs.	Louisville & Nashville R. R. stock. Par value $100. Listed NYSE. At 90½	9,050.00
17.	800 shs.	Massachusetts Bonding & Insurance Co. Par value $12.50. Unlisted. Inc. in Mass. At 63½	50,800.00
18.	50 shs.	Massachusetts Hospital Life Insurance Co. stock. Par value $100. Unlisted. Inc. in Mass. At 93½	4,675.00
19.	500 shs.	Mathieson Alkali Works, Inc. stock. No par value. Listed NYSE. Inc. in Virginia. At 40½	20,250.00
20.	134 shs.	Midland Warehouse & Transfer Co. stock. Par value $100. Unlisted. Inc. in Illinois. At 50.	6,700.00
21.	65 shs.	New England Trust Co. (Boston) Par value $100. Unlisted. Inc. in Mass. At 400	26,000.00
		Dividend declared prior to death	975.00
22.	200 shs.	New Jersey Insurance Co. Par value $20. Unlisted. Inc. in New Jersey. At 46½	9,300.00

23.	1033 shs.	New Mexico & Arizona Land Co. stock. Par value $1.00. Listed N. Y. Curb Exch. At 4..		4,132.00
24.	500 shs.	Northern Pacific Ry. Co. stock. Par value $100. Listed NYSE. At 27¾. Inc. in Wisconsin....		13,875.00
25.	27 shs.	Pere Marquette Railway Co. Prior Preference stock. Par value $100. Listed NYSE. At 87.		2,349.00
26.	753 shs.	Pere Marquette Railway Co. Pfd. stock. Par value $100. Listed NYSE. At 90.....		67,770.00
27.	100 shs.	Philadelphia Co. 6% Cum. Pfd. stock. Par value $50. Listed NYSE. at 53.....		5,300.00
28.	500 shs.	Seaboard Fire & Marine Insurance Co. stock. Par value $5.00. Unlisted. Inc. in New York. At 13.....		6,500.00
[fol. 16]				
29.	100 shs.	Standard Oil Co. of N. J. stock. Par value $25. Listed NYSE. Inc. in New Jersey. At 68¾...		6,875.00
30.	42 shs.	Texas Land Syndicate #3. Par value none. Unlisted. Unincorporated. At ⅛.....		5.25
31.	14 shs.	Texas Land Syndicate. No par value. Unlisted. At ⅛.....		1.75
32.	300 shs.	United Carr Fastener Corporation stock. No par value. Listed NYSE. At 29½.....		8,850.00
33.	200 shs.	United Fruit Company Capital stock. No par value. Listed NYSE. Inc. in New Jersey. At 83.....		16,600.00
		Dividend declared prior to death.....		150.00
34.	300 shs.	United States Cold Storage Co. Common stock. No par value. Inc. in Delaware. At 5¾.....		1,725.00
35.	36 shs.	Washington, D. C. Investment Trust. Unlisted. At 75¢.....		27.00
36.	100 shs.	William Wrigley, Jr. Company stock. No par value. Listed NYSE. Inc. in Delaware. at 71¼.....		7,125.00
		Dividend thereon declared prior to death.....		100.00
37.	36 shs.	Worcester Building Trust. Worcester, Mass. Unlisted. At 25¢.....		9.00
38.	1000 shs.	Wright-Hargreaves Mines, Ltd. No par value. Listed NY Club Exchange. At 7⅝.....		7,625.00
		Dividends declared prior to death.....	$250.00	
		Less Canadian Tax 5%.....	12.50	
				237.50
39.	$26,000.	Loan to Elizabeth E. Gorrie with interest at 5%..		26,000.00
		Accrued interest from 11/1/36 to 1/1/37.....		220.28
[fol. 17]				
40.		Nathaniel Thayer Estate, Partial Distribution Certificate (60 parts) represents undivided interest in Chicago Real Estate. At.....		14,964.00
41.	120 shs.	Drovers National Bank, Kansas City, Mo. in liquidation. At 2.....		240.00
42.		Merchants National Bank, 28 State Street, Boston, Mass. Checking account $126,990.76 Less amt. due Estate of Eugene V. R. Thayer.		
		Unpaid income collected to Dec. 31, 1936.....	$13,003.39	
		Unpaid commission as trustee to Dec. 31, 1936.....	854.89	13,888.28
				113,102.48
43.		1/18th interest in final payment in liquidation on 20 shares of Missouri Land Association.....		27.40
44.		Refund of insurance premium re Maine camp....		41.12

Securities Believed to be Worthless

1.	1200 shs. City Central Corporation	—0—
2.	3 shs. City Real Estate Trust, Chicago, Ill	—0—
3.	Eastern Kentucky Railway Sundries	—0—
4.	12 shs. Naumkeag Copper Co.	—0—
5.	128 shs. Pacific Copper Company	—0—
6.	10 shs. Runaway Brook Golf Club	—0—
7.	184-40/50 shs. Stock Yards Investment Company	—0—
8.	11 shs. Winthrop Building	—0—
	Total Schedule F	$1,148,049.69
	Deduct as per Schedule F (a)	81,741.70
	Net—Schedule F	$1,066,307.99

[fol. 18] Schedule F (a)

Eugene V. R. Thayer, Sr., father of said Eugene V. R. Thayer, died on December 20, 1907. By his last will and testament, probated in Worcester County, Massachusetts, on January 14, 1908, he created a trust fund, the beneficiaries of which, after the death of his wife, were his three children, of whom said Eugene V. R. Thayer was one. Said Eugene V. R. Thayer was also one of the Trustees.

On July 8th, 1911, with the approval of the other Trustees and of the adult beneficiaries and in accordance with his understanding of the somewhat ambiguous provisions of his father's will, but without authorization by the Court, said Eugene V. R. Thayer segregated his one-third share of the trust fund and thereafter managed it as a separate trust, with the result that at the time of his death the value of his share of the trust fund substantially exceeded one-third of the value of the entire fund if combined.

After the death of Eugene V. R. Thayer, an account was filed with the Worcester County Probate Court by the Trustees under the Will of Eugene V. R. Thayer, Sr., and upon that accounting it was contended on behalf of other parties in interest that the segregation above mentioned was illegal, and that Eugene V. R. Thayer's share of the fund was in reality one-third of the total, and not the one-third which he had in his possession at the time of his death. The matter having been set down for a hearing in the Probate Court, [fol. 19] a discussion was had between the various parties in interest and a compromise was agreed upon substantially upon the basis of an equal division of the amount in dispute.

By the Will of Eugene V. R. Thayer he executed the power of appointment given him by his father's Will, and directed

that his share of the trust fund be paid over to his wife Elizabeth Harding Thayer.

Under the above settlement agreement, there was to be deducted out of the share of the trust fund theretofore administered by said Eugene V. R. Thayer the sum of $75,023.75, which was one-half the amount in dispute, and which was to be paid over to the Trustees under the Will of Mr. Thayer's father for the benefit of the other beneficiaries. This agreement was submitted on petition to the Worcester County Probate Court and was approved by said court on the first day of February, 1938, and it was decreed by said court that the trust should be administered in accordance with said settlement agreement. The decree also fixed the amount of the fees and expenses of counsel and of the guardian *ad litem*, and directed that a pro rata amount of the same should be paid out of the share of the trust estate held at the time of his death by said Eugene V. R. Thayer.

The pro rata share payable out of said Eugene V. R. Thayer's share of the trust fund as fixed by said decree was $5,143.35.

[fol. 20] There should also be deducted in computing the value of the appointive property the following disbursements incurred by or on behalf of the Trustees and chargeable against the appointive estate:

Transfer tax stamps on securities transferred to Mrs. Thayer	$513.25
Register of Probate, Worcester, Mass.—Filing fee	84.00
Register of Wills, Allegheny Co., Penna.	3.00
Probate Court Jackson Co., Missouri	25.00
Langworthy, Spencer & Terrell, legal services Kansas City a/c sale of 14 shs. Inter-State National Bank stock	50.00
State Treasurer, State of Missouri—Waiver	.50
Total	$675.75

It will also be necessary to deduct the cost of State and Federal tax stamps on the securities forming part of the trust fund and still to be delivered to Mrs. Thayer, which will amount to $87.50. There should also be deducted from

the total shown by Schedule F the following additional items:

Mar. 5, 1937—Collector of Internal Revenue, New York, N. Y.—Payment in full of Income Tax for 1936 of Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer	$ 134.91
Aug. 12, 1937—Collector of Internal Revenue, New York N. Y.—Additional tax assessed Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer [fol. 21] on income for 1935	676.44
Total	$ 811.35

The total amount to be deducted from the appointive property as shown by Schedule F is therefore as follows:

Amount as per settlement	$75,023.75
Pro rata share of fees allowed by Court and required to be paid out of Eugene V. R. Thayer's share of trust	5,143.35
Prospective disbursement for tax stamps on transfer of remainder of trust fund to Mrs. Thayer	87.50
Other disbursements listed above	675.75
Payment made on 3/5/37 to Collector of Internal Revenue, New York, N. Y. in full of income tax for 1936 of Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer	134.91
Payment made on 8/12/37 to Collector of Internal Revenue, New York, N. Y. for additional tax assessed Trustees u/w E. V. R. Thayer for Eugene V. R. Thayer on income for 1935	676.44
Total	$81,741.70

The assets constituting Mr. Thayer's share of the trust fund were in liquid form, and came into the possession of his executors.

[fol. 22] The settlement agreement above referred to ratified the previous delivery to Mrs. Thayer of certain items of the appointive estate, and provided that the executors should distribute the remainder of the appointive estate to Mrs. Thayer, as appointee of her husband's share, less the agreed deductions, and that the executors might treat

all assets held by them which constituted part of Mr. Thayer's share of the trust fund as if they had constituted assets of the estate of Mr. Thayer and that the executors might account to Mrs. Thayer for such assets, as a part of their account to her as residuary legatee. The executors have, therefore, with the written approval of Mrs. Thayer, who was a party to the settlement agreement, treated the appointive estate as in all respects part of decedent's estate, and it is so treated in this return.

IN SURROGATE'S COURT—COUNTY OF NEW YORK

In the Matter of The Appraisal Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased

AFFIDAVIT OF ELIZABETH E. GORRIE

STATE OF NEW YORK,
City and County of New York, ss:

ELIZABETH E. GORRIE, being duly sworn, deposes and says:

[fol. 23] I. I am one of the Executors of the above Estate.

II. A question having arisen concerning the taxable status of the appointive estate referred to in Schedule F (a) of the New York Estate Tax Return herein, verified March 8, 1938, the following facts are submitted for the information of the New York State Tax Commission, and it is respectfully requested that this affidavit be accepted and filed as supplemental to and as part of said Return:

In said Schedule F (a) the following statement was made:

"Said Eugene V. R. Thayer segregated his one-third share of the trust fund and thereafter managed it as a separate trust."

The statement above quoted was not intended to mean that Mr. Thayer became sole trustee of said one-third share. He continued to act as one of the three trustees for both trusts, namely, his one-third share of the trust created by his father's will, and the two-thirds share set apart for his sisters. As shown by said Schedule F (a) the division of the trust fund left by the will of decedent's father into

a one-third share and a two-thirds share was made in July, 1911. Mr. Thayer was then a resident of the State of Massachusetts and remained a resident of said State until 1918. In 1918 Mr. Thayer came to New York and remained in New York until 1929. For convenience, his share of the trust fund, viz., the share of which he received [fol. 24] the income, and with respect to which he had a power of appointment, was brought to this State at that time and was kept in a separate safe deposit box here during his residence in New York. It was in no sense commingled with his own funds but was at all times kept separate and distinct. He never acted or attempted to act as sole trustee of said one-third share but was at all times one of the three trustees having charge thereof. Two of the trustees of said trusts were at all times residents of the State of Massachusetts. In 1929, Mr. Thayer removed to Chicago, Illinois, and remained there as a resident of that State until 1934. At that time, for his convenience, the one-third share which had been set apart with respect to him was removed to Chicago and remained in that State for said five year period. In 1934 Mr. Thayer returned to New York and again brought the one-third share of the trust fund into this State.

The State of Massachusetts adopted an income tax law in 1916. At all times subsequent to the adoption of said law, the trustees of both of said trusts filed State income tax returns in Massachusetts with respect to said trusts, respectively, and paid taxes on all taxable capital gains shown thereby. Said returns showed that there were three trustees.

The annual accounts required by the Massachusetts law to be filed in the Probate Court of Worcester County, Massachusetts, were prepared with respect to both of said trusts from the time of the segregation, and all showed the names [fol. 25] of three trustees. Separate federal income tax returns were prepared and filed with respect to both of said trusts at all times subsequent to the adoption of the federal income tax act, and in each instance showed that there were three trustees.

Elizabeth E. Gorrie.

Sworn to before me this 20th day of September, 1938. Anthony F. Cassidy, Notary Public, New York County. Clerk's No. 248, Reg's. No. 00449. Commission expires March 30, 1940.

LAST WILL AND TESTAMENT AND CODICIL OF DECEDENT-DONEE

I, Eugene V. R. Thayer, of Chicago, Cook County, Illinois, being of sound mind and memory, do hereby make, publish and declare this my Last Will and Testament hereby revoking all former Wills by me at any time made.

First. I direct that my just debts and funeral and testamentary expenses be paid out of my estate by my executors hereinafter named as soon after my death as may be convenient, together with all inheritance, legacy, succession, transfer or similar duties or taxes which may become payable with respect to any property or interest passing under this Will. I desire to be buried in the town of Lancaster, [fol. 26] Massachusetts, and I hereby authorize my executors to make provision out of my estate in such manner as they may deem proper for the care and maintenance of any cemetery plot in which I may be buried.

Second. I give and bequeath to my stepson Frederick Henry Prince, 3rd, in case he shall survive me, the sum of Ten Thousand Dollars ($10,000).

Third. I give and bequeath to the Unitarian Church, of Lancaster, Massachusetts, the sum of Five thousand Dollars ($5,000).

Fourth. I give and bequeath the sum of One hundred thousand dollars ($100,000) to Elizabeth E. Gorrie, in consideration of many years of loyal and efficient service as my secretary.

Fifth. I give, devise and bequeath to my wife Elizabeth Harding Thayer, in case she shall survive me, for her own use absolutely, whether I shall or shall not leave issue me surviving, or issue born after my death, all the rest, residue and remainder of my property of whatsoever nature and kind the same may be and wheresoever situated, together with all reversions, remainders and other property, if any, over which I now have or at the time of my death may have any power of appointment or testamentary disposition.

Sixth. In case my said wife Elizabeth Harding Thayer [fol. 27] shall predecease me, I direct that all the rest, residue and remainder of my estate, including the reversions and remainders hereinbefore referred to and whether I

shall or shall not leave issue me surviving, or issue born after my death, be divided into three (3) equal shares.

Seventh. I give, devise and bequeath one of said three equal shares to my said stepson Frederick Henry Prince, 3rd, or in case he shall predecease me, then in equal shares to my sisters hereinafter named, the survivor to take all, excepting that the lawful issue of either such sister who may predecease me leaving lawful issue her surviving shall take in equal shares *per stirpes* and not *per capita* the share which such deceased sister would have taken under this clause, if living.

Eighth. I give, devise and bequeath another of said three equal shares to my sister Katherine T. Cate, wife of Curtis W. Cate, Esq., of Carpinteria, California, or in case she shall predecease me, to her son Henry Russell, or in case of his death, to my sister Susan T. Bigelow, now of Beverly Farms, Massachusetts, or in case of her death, to her son Eugene Thayer Bigelow.

Ninth. I give, devise and bequeath another of said three equal shares to my said sister Susan T. Bigelow, or in case she shall predecease me, to her son Eugene Thayer Bigelow, or in case both my said sister and her said son shall pre- [fol. 28] decease me, then to my said sister Katherine T. Cate, or in case of her death, to her said son Henry Russell.

Tenth. Whereas I may leave unfinished at my decease various matters of business, financial enterprises or undeveloped investments, and whereas any property in which my estate may at any time *he* invested may require for its preservation or development the investment of further sums:

Now, I authorize my executors whenever in their uncontrolled discretion it shall seem advisable to expend or pledge any portion or portions of my estate or to borrow such amount of money thereon or otherwise to do such other acts and things as in their judgment may be requisite to carry through and complete such unfinished matters of business, enterprises or investments, or for the preservation or development of any such property.

Eleventh. I further authorize my said executors in their discretion to vote, in person or by proxy, upon all stocks held by them; to unite with other owners of similar property in carrying out any plan for the reorganization of any

corporation or company whose securities form a portion of my estate; to exchange the securities of any corporation for others issued by the same or by any other corporation, upon such terms as said executors shall deem proper; to assent to the consolidation or merger of any corporation [fol. 29] whose securities are held by them with any other corporation, to the lease by such corporation of its property or any portion thereof, to any other corporation or to the lease by any other corporation of its property to such corporation, and upon such consolidation, merger, lease or similar arrangement to exchange the securities held by them for other securities issued in connection with such arrangement; to pay all such assessments, expenses and sums of money as they may deem expedient for the protection of their interests as holders of the stocks, bonds or other securities of any corporation or company, and, generally, to exercise in respect to all securities held by them all the same rights and powers as are or may be lawfully exercised by persons owning similar property in their own right.

Twelfth. I name, constitute and appoint as Executor and Executrix of this my Last Will and Testament Carl J. Schmidlapp, Esq., of Mill Neck, Nassau County, Long Island, New York, and Elizabeth E. Gorrie, of Chicago, Illinois. The word "Executor" as elsewhere used in this my Will shall include "Executrix". In case either of my said Executors shall predecease me, or shall be unable or unwilling to act as Executor hereunder, or shall die before my estate shall be fully administered, I name, designate and appoint as his or her substitute or successor as Executor hereunder, Willard A. Mitchell, of New York City. No executor or Executrix named in this Will shall be required [fol. 30] to give any bond or other security in this or any other State for the faithful performance of his or her duty as such or otherwise.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, in the Borough of Manhattan, City, County and State of New York, this 19th day of October, Nineteen hundred and thirty-two.

Eugene Y. R. Thayer (Seal.)

The foregoing instrument, consisting of four and three-fifths sheets of paper, was on the day of the date thereof,

signed, sealed, published and declared by Eugene V. R. Thayer, the Testator therein named, as and for his Last Will and Testament in the presense of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Willard A. Mitchell, 1040 Park Av., New York City; Anthony F. Cassidy, Albee Court, Larchmont, N. Y.; Gordon Peach, 1155 Dean St., Brooklyn, N. Y.

Codicil of Decedent-Donee

I, Eugene V. R. Thayer, of Chicago, Cook County, Illinois, having heretofore made and executed my Last Will [fol. 31] and Testament dated the Nineteenth day of October One thousand nine hundred and thirty-two, do hereby make, publish and declare this as and to be a Codicil thereto.

First. I hereby amend paragraph numbered "Eleventh" of my said Will by adding at the end thereof the following sentence:

"In any case in which my executors are required under the provisions of this Will to divide my estate or any portion thereof into parts or shares, or to distribute the same, or to make any cash payment, I authorize them in their discretion to make such division, payment or distribution in kind, or partly in kind and partly in money, and to that end to allot specific securities or other property, or any undivided interest therein, to any share or shares, or to any beneficiary, and for the purpose of such allotment the judgment of my executors concerning the propriety thereof and the value for the purpose of distribution or payment of the securities or other property, or interest therein, so allotted, shall be conclusive upon all persons interested in my estate, and for convenience I further direct that my said executors may if they see fit, in making any division or distribution hereunder, take the values of any or all items of property to be distributed, as of the date of my death."

Second. In all other respects, except as hereby amended, I do hereby ratify my said Last Will and Testament.

[fol. 32] In Witness Whereof, I have hereunto subscribed my name and affixed my seal, in the Borough of Manhattan, City, County and State of New York, this 24th day of April One thousand nine hundred and thirty-three.

Eugene V. R. Thayer. (Seal.)

The foregoing instrument, consisting of one and one-third sheets of paper, was on the day of the date thereof, signed, sealed, published and declared by Eugene V. R. Thayer, the Testator therein named, as and for a Codicil to his Last Will and Testament, in the presence of us, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

Willard A. Mitchell, 1040 Park Av., New York City; Anthony F. Cassidy, Albee Court, Larchmont, N. Y.; Gordon Peach, 1155 Dean St., Brooklyn, N. Y.

LAST WILL AND TESTAMENT AND CODICIL OF E. V. R. THAYER, SR.—DONOR

I, Eugene V. R. Thayer, of Lancaster, in the County of Worcester and Commonwealth of Massachusetts, make this my last Will and Testament.

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Susan S. Thayer, furniture, etc.

First. After the payment of all my just debts I give to my wife, Susan S. Thayer, absolutely in fee, all my furniture, plate, fixtures, stationery, pictures, books and household stores, except those that fall within the provision of the second clause hereof.

Susan S. Thayer, for life, remainder to E. V. R. Thayer, estate at Lancaster and contents.

Second. I give to my said wife for her life, and upon her death to my son, Eugene V. R. Thayer, all my land and the buildings thereon, constituting my estate in said Lancaster, including in the same the contents of houses, stables and barns thereon, and all the personal property and live stock ordinarily used and enjoyed therewith. I also give to my said wife for her life my house on Raleigh Street in Boston, with the contents thereof.

Susan S. Thayer, for life, house on Raleigh Street and contents.

Susan S. Thayer, horses, carriages, articles of personal use.

Third. I give to my said wife, absolutely in fee, all my horses, carriages, vehicles, harnesses, and all other articles appertaining thereto, or used therewith, excepting as may fall within the provisions of the second clause above written; also my clothing and all articles of personal use or adornment.

Residue of estate to trustees for following purposes:

Fourth. All the rest and residue of my estate of every description, including all the reversions and remainders and all property over which I may at the time of my death have any power of appointment or testamentary disposition, I give and devise to my trustees, but in trust nevertheless for the following purposes:

To pay debts, pecuniary legacies and legacy taxes.

(1) To pay all my debts and all the expenses of administration of my estate and to pay any

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pecuniary legacies which may be given by this Will or by any Codicil or Codicils thereto, and to pay all legacy or inheritance taxes or succession duties payable under the laws of any State or Country, all of which should be paid out of my residuary estate and not by the legatees.

During life of wife to pay taxes on Raleigh Street house, and taxes and expenses at Lancaster.

(2) During the life of my wife to pay all the taxes and assessments on said house and land on Raleigh Street, and also to pay all taxes and assessments on the estate at Lancaster and all expenses for keeping the buildings on said estate in repair and for keeping up the gardens and grounds and carrying on the farm, which taxes, assessments and expenses are not to be borne by my wife but are to be treated as a part of the expenses of the residuary estate.

Susan S. Thayer, $50,000 yearly.

(3) To pay over from the net annual income of my estate to my said wife, Susan S. Thayer, in each and every year during her life, in equal quarterly payments, the sum of fifty thousand dollars ($50,000.).

E. V. R. Thayer, after his mother's death, $10,000 per year.

(4) To pay to my son, Eugene V. R. Thayer, upon his coming into possession, at his mother's death, of my Lancaster estate, as hereinbefore provided, the sum of ten thousand dollars ($10,000.) per year, so long as he shall own and keep the same, the above sum to be used in defraying expenses of keeping up the said estate.

Divide remaining income between children and issue of deceased children.

(5) During the life of my wife to divide the remaining income quarterly between my children and the issue of my deceased children living at the time of each division, equally, by right of representation;

E. V. R. Thayer, to have power of appointment.

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Provided that if my son, Eugene V. R. Thayer, survives me, he shall have full power to appoint by will to whom his share of income with any accretions thereto shall be paid.

After setting apart funds for annuities, divide trust fund into shares for children and issue of deceased children.

(6) And after my trustees have set apart so much of the principal of the fund as will in their judgment always furnish sufficient income to pay any annuities given by this Will or any Codicil, to divide the trust fund into as many shares as there are children of mine then living, or deceased leaving issue then living; and to pay over the shares of deceased children to their issue, and continue to hold the shares of living children in trust as provided in Clause 7; Provided that if my son, Eugene V. R. Thayer survives me, he shall, whether he leaves issue or not, have full power to appoint by will to whom his share of the principal shall be paid, and in case he makes such appointment his appointees shall receive the same share which his issue, if any, would have received had he died intestate leaving issue.

E. V. R. Thayer, to have power of appointment.

Share of E. V. R. Thayer; income to him for life, on his death as he shall appoint.

(7) The shares held in trust for my son, Eugene V. R. Thayer, under the provisions of Clause 6, shall be held in trust to pay him the income quarterly during his life, and on his death to pay the principal as he shall by his will appoint, and in default of appointment, to his issue, and in default of issue living at his death, to my issue.

Shares of other children; income to them for life, principal to their issue.

The share held in trust for my other children shall be held in trust to pay the income to them quarterly during their lives, and on the death of

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any child to pay the principal to its issue, or, in case it has no issue living at its death, to my issue.

Reversions to be added to trust, if wife living, otherwise divided among issue.

(8) If by the coming in of any reversions or legacy or by the death of any person or in any other way any sum shall be added to my estate, or if any part of my estate set apart under the provisions of Clause 6, or under any provisions of my Will or any Codicil, shall revert to the residue, I shall desire that if my wife is living such sum shall be added to the trust fund, but if she be dead I desire that it be divided among my issue, the share of any of my children to be added to its share of the trust fund.

Share of any child to be added to trust.

Issue means descendants by right of representation.

Wherever in this Will payments are directed to be made to the issue of any person I desire them to be made to the descendants of such person in any degree by right of representation.

Income for grandchild to be applied to maintenance during minority.

(9) Whenever by the provisions of the preceding clauses income becomes payable to any grandchild of mine such income shall during the minority of the grandchild be applied by my trustees for its suitable maintenance so far as necessary, and the balance capitalized for its separate benefit and the income and principal thereof disposed of precisely as is such grandchild's share of the income and principal of the general fund.

Balance to be capitalized for such grandchild.

Principal payable to grandchild to be held by trustees during minority.

Whenever by the preceding clauses any sum of principal is payable to any grandchild of mine such sum shall, if such grandchild is a minor, be held by my trustees during its minority and the income applied to its suitable maintenance so far

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as necessary, and the balance capitalized and added to the principal which shall be paid to it on reaching twenty-one, or, if it dies after twenty-one then paid immediately on its death to its children, if any, and if it leaves no children, then to the descendants of its mother then living by right of representation, and if there are no descendants of its mother then living then to my descendants then living by right of representation.

To more remote descendants payments shall be made directly.

Whenever any sum, whether income or principal, is payable to a descendant of mine more remote than a grandchild, such sum shall be paid to it directly or to a guardian for its use.

No interest under this will assignable or liable to creditors.

No interest of any person under this will shall be assignable or liable to be attached or taken in any way by creditors.

Provisions for wife are in lieu of dower.

Fifth. The provisions hereinbefore made for my wife are in lieu of dower and of any and all claims to or upon my estate whether real or personal.

Responsibility as endorser or guarantor for brothers to continue for twenty years, but shall not be increased.

Sixth. In case I am at the time of my decease responsible as endorser or guarantor or in any way for any debt or obligation of my brothers, or either of them, I desire that such responsibility for each brother shall continue as a lien on my estate for twenty years after my death, if he lives so long, or if he dies within that time, for eighteen months after his death, and that neither of my brothers be required to relieve my estate from

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such responsibility or to reduce the amount thereof during said respective periods, but such responsibility shall not be increased beyond the amount which shall be existing at my death.

Executors and trustees to carry out voluntary arrangements for the benefit of Mrs. Alice R. Thayer and various other persons, as to income.

Seventh. Whereas I have heretofore joined with my brothers and sisters in a certain voluntary arrangement by which, until notice from me to the contrary, the trustees under my father's will are to appropriate a portion of the income becoming due to me from time to time to and for the benefit of Mrs. Alice R. Thayer;

And whereas I have made other such arrangements for the payment of money by me or out of my share of the income of my father's estate to various persons and may hereafter make other similar arrangements;

Now, therefore, I desire that my executors and trustees shall respect and observe the said arrangements and so far as they legally may, and as it shall in their uncontrolled discretion prove to be necessary, shall cause them to be carried into full effect from and out of my estate.

Vacancies in number of trustees.

Eighth. If at any time from any cause the number of trustees under this Will shall be less than three, then I direct the surviving or remaining trustee or trustees to fill the vacancy or vacancies by appointing a new trustee or trustees by proper instrument in writing and the trustee or trustees so appointed shall have all the powers given to my trustees by this Will and shall be exempt from giving security on their bond. Notwithstanding

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any vacancy the remaining or surviving trustee or trustees shall for the time being have all the powers vested in my trustees, but in case such vacancy shall not be filled by appointment, as hereinbefore provided, within ninety days after the same shall occur, a new trustee shall be appointed at the request of any party in interest by the Judge of the Probate Court wherein my estate shall be administered with like effect as if he were appointed by the surviving or remaining trustee or trustees.

Responsibility of trustees.

Ninth. My trustees shall be chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, and shall be accountable only for their own acts, receipts, neglects or defaults and not for those of each other, nor for any banker, broker or other person with whom trust moneys or securities may be deposited nor for the loss in value of any stock or securities unless the same shall happen through their own wilful default.

Legacies payable after three years; interest at 5 per cent shall run from death.

Tenth. My executors shall not be required to pay any legacies made by this Will nor any Codicil which I may make until the expiration of three years after my decease, but interest at five per cent. per annum shall run from my death on all legacies, the payment of which is not directed to be postponed.

Executors and trustees not to give surety; to have full power to sell real and personal property.

Eleventh. No executor of or trustee under this Will shall be required to give any security or securities on his probate bond, and my executors

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as well as my trustees shall have full power to sell my real or personal property at public or private sale without the aid of any court.

Majority of executors or trustees may exercise all powers.

Twelfth. The majority of my executors and the majority of my trustees may exercise all the powers herein given to my executors and trustees respectively.

In Testimony Whereof I hereunto set my hand and seal and in the presence of three witnesses declare this to be my last Will this fifth day of September, A. D. 1906.

EUGENE V. R. THAYER.

On this fifth day of September, A. D. 1906, Eugene V. R. Thayer, of Lancaster, Massachusetts, signed the foregoing in our presence, declaring it to be his last Will, and as witnesses thereof we three do now at his request, in his presence and in the presence of each other, hereto subscribe our names.

ALBERT E. JEWETT,
Clinton, Mass.

HELEN B. CARVILL,
Clinton, Mass.

CHARLES MAYBERRY,
Clinton, Mass.

Codicil

I, Eugene V. R. Thayer, of Lancaster, in the County of Worcester and Commonwealth of

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Massachusetts, do make this Codicil to my Will heretofore made and published by me and dated the 5th day of September, A. D. 1906, which Will I hereby ratify and confirm in all respects except as the same may be changed by this instrument.

Nathaniel Thayer, Eugene V. R. Thayer, and James E. Crone, executors and trustees.

First. I appoint my brother, Nathaniel Thayer, of Lancaster; my son, Eugene V. R. Thayer, of Lancaster; and James E. Crone, of Lexington, my executors and trustees, with all the powers, privileges and immunities given to my executors and trustees by my will.

Eugene V. R. Thayer $100,000.

Second. I give to my son, Eugene V. R. Thayer, the sum of One Hundred Thousand Dollars ($100,000.).

Susan Thayer $100,000.

Third. I give to my daughter, Susan Thayer, the sum of One Hundred Thousand Dollars ($100,000.), to be paid to her when she reaches the age of twenty-three (23) years.

$100,000 in trust, to pay the income to Katharine Thayer Russell during life, on her death as she shall by will appoint, among her descendants or my descendants, and in default of appointment to my descendants. Trustees may pay over principal.

Fourth. I give to my trustees hereinbefore named the sum of One Hundred Thousand Dollars ($100,000.) in trust to pay the income thereof to my daughter, Katharine Thayer Russell, during her life, and on her death to such of her descendants, or to such of my descendants, in such amounts and on such trusts as she shall by Will, or by instrument in the nature of a Will, with or without the consent of her husband, direct and appoint, and in default of such appointment, to her descendants by right of representation, and if she has no descendants living at her death then to my descendants by right of representation. If my

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trustees in their uncontrolled discretion think it best they may pay over from time to time, or at any time, any part or the whole of the principal of the trust fund hereby created to my said daughter, Katharine Thayer Russell. The interest of my daughter under the provisions of this article shall not be assignable or liable to be attached or taken in any way by her creditors.

Interest not assignable or liable to her creditors.

Fifth. I direct my trustees to pay annually during her life to Alice S. Blake, widow of James H. Blake, a sum sufficient to pay the rent of her house, not to exceed Sixteen Hundred Dollars ($1600.) per annum; also a sum sufficient to pay the taxes thereon should she be required to pay them.

Alice S. Blake, rent of house not exceeding $1600 per annum, and taxes.

Sixth. I give to my sister-in-law, Alice R. Thayer, the sum of Five Thousand Dollars ($5,000.) token of my esteem and regard.

Alice R. Thayer, $5,000.

Seventh. I give to my sister-in-law, Pauline R. Thayer, the sum of Five Thousand Dollars ($5,000.) in token of my esteem and regard.

Pauline R. Thayer, $5,000.

Eighth. I give to my sister-in-law, Evelyn R. Thayer, the sum of Five Thousand Dollars ($5,000.) in token of my esteem and regard.

Evelyn R. Thayer, $5,000.

Ninth. I give to my sister-in-law, Ruth S. Thayer, the sum of Five Thousand Dollars ($5,000.) in token of my esteem and regard.

Ruth S. Thayer, $5,000.

Tenth. I give to my nephew, N. Thayer Robb, of New York, the sum of Five Thousand Dollars ($5,000.).

N. Thayer Robb, $5,000.

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James Parker $5,000.

Eleventh. I give to my friend, James Parker, of Beverly, Massachusetts, the sum of Five Thousand Dollars ($5,000.).

Robert C. Hooper, $5,000.

Twelfth. I give to Robert C. Hooper, of Boston, the sum of Five Thousand Dollars ($5,000.).

William A. Marston, $5,000.

Thirteenth. I give to my cousin, William A. Marston, of Paris, France, the sum of Five Thousand Dollars ($5,000.).

E. Rollins Morse, $5,000.

Fourteenth. I give to E. Rollins Morse, of Boston, the sum of Five Thousand Dollars ($5,000.).

H. R. Dalton, Jr., $5,000.

Fifteenth. I give to H. R. Dalton, Jr., of Boston, the sum of Five Thousand Dollars ($5,000.).

Stephen V. R. Crosby, $5,000.

Sixteenth. I give to my cousin, Stephen V. R. Crosby, of Boston, the sum of Five Thousand Dollars ($5,000.).

Henry E. Russell, $5,000.

Seventeenth. I give to Henry E. Russell, of Cambridge, the sum of Five Thousand Dollars ($5,000.).

Henry S. Blake, $5,000.

Eighteenth. I give to Henry S. Blake, of Boston, Massachusetts, the sum of Five Thousand Dollars ($5,000.).

Oliver Ames, $5,000.

Nineteenth. I give to Oliver Ames, of North Easton, the sum of Five Thousand Dollars ($5,000.).

Horatio McKay, $5,000.

Twentieth. I give to Horatio McKay, late of the Cunard service, the sum of Five Thousand Dollars ($5,000.) as a token of my esteem and friendship for him.

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Twenty-first. I give to Edward F. Ripley, the sum of Twenty-five Hundred Dollars ($2500.). Edward F. Ripley, $2,500. (lapsed).

Twenty-second. I give to Allan G. Buttrick, of Lancaster, the sum of Three Thousand Dollars ($3,000.). Allan G. Buttrick, $3,000.

Twenty-third. I give to Charles Starbuck the sum of Ten Thousand Dollars ($10,000.) in token of my appreciation of his long and faithful services. Charles Starbuck, $10,000.

Twenty-fourth. I give to Betty Lofgren and Mary Williams the sum of One Thousand Dollars ($1,000.) each if they are in my employ at the time of my death. Betty Lofgren and Mary Williams, $1,000 each.

Twenty-fifth. I give to Mrs. Anna N. Johnson, formerly Anna O. Nelson, the sum of One Thousand Dollars ($1,000.). Anna N. Johnson, $1,000.

Twenty-sixth. I give to Lillian L. Orr the sum of Twenty-five Hundred Dollars ($2,500.) in recognition of her faithful service to my wife. Lillian L. Orr, $2,500.

Twenty-seventh. I give to Helen G. Lufkin the sum of Five Hundred Dollars ($500.) in recognition of her faithful service to my wife. Helen G. Lufkin, $500.

Twenty-eighth. I give to my friend, Dr. Walter P. Bowers, of Clinton, Massachusetts, the sum of Five Thousand Dollars ($5,000.). Walter P. Bowers, $5,000.

Twenty-ninth. I give to T. Dennie Boardman, of Manchester, Massachusetts, the sum of Five Thousand Dollars ($5,000.). T. Dennie Boardman, $5,000.

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Henry D. Burnham, $5,000.

Thirtieth. I give to Henry D. Burnham, of Stonington, Connecticut, but who resides in Boston, the sum of Five Thousand Dollars ($5,000.).

Francis Peabody, Jr., $5,000.

Thirty-first. I give to Francis Peabody, Jr., of Boston, the sum of Five Thousand Dollars ($5,000.).

E. O. Orpet, $2,000.

Thirty-second. I give to E. O. Orpet, provided he is in my employ at the time of my death, the sum of Two Thousand Dollars ($2,000.).

Mrs. Arabel Haskell, $500.

Thirty-third. I give to Mrs. Arabel Haskell the sum of Five Hundred Dollars ($500.) in recognition of her faithful service to my wife.

Elizabeth B. Everett, $1,000.

Thirty-fourth. I give to Elizabeth B. Everett the sum of One Thousand Dollars ($1,000.).

Clayton C. Sweatt, $1,000.

Thirty-fifth. I give to Clayton C. Sweatt, of Andover, Maine, the sum of One Thousand Dollars ($1,000.).

Town of Lancaster, for perpetual care of burial lot, $1,000.

Thirty-sixth. I give to the Town of Lancaster the sum of One Thousand Dollars ($1,000.), the same to be accepted and used in the manner provided by law for the perpetual care of my burial lot in the cemetery in said town.

Town Hall at Lancaster if brothers determine.

Thirty-seventh. Whereas my brothers and myself have heretofore, voluntarily, contemplated and proposed to construct at our joint cost and expense a Town Hall in said Lancaster as a gift to said town, in memory of our father, Now, Therefore, if my said brothers, or any of them, shall at any time within five years after my de-

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cease determine to consummate said purpose, and undertake such construction, and make such gift, and shall so notify my executors and trustees, my said trustees shall pay from the principal of their trust funds existing at the time of such payment one-fourth part of the total expense of the construction of such Town Hall.

Susan S. Thayer $2,000 for servants.

Thirty-eighth. I give to my wife, Susan S. Thayer, the sum of Two Thousand Dollars ($2,000.) to be distributed by her among the servants in my employ at my decease, except those who have been in my employ ten years or over, and to them I devise the sum of Five Hundred Dollars ($500), each, except Charles Starbuck, E. O. Orpet, Anna N. Johnson, Mary Williams and Betty Lofgren, for whom I have made provision heretofore.

Servants employed ten years or over, $500 each, except those specially provided for.

Joseph Whalen, $500.

Thirty-ninth. I give to Joseph Whalen, now head barber at Young's Hotel, the sum of Five Hundred Dollars ($500.).

Raphael Tuccio, $250.

Fortieth. I give to Raphael Tuccio, now barber at Young's Hotel, the sum of Two Hundred and Fifty Dollars ($250.).

Fred C. French, $1,000.

Forty-first. I give to Fred C. French, if in my employ at the time of my death, the sum of One Thousand Dollars ($1,000.).

Walter F. Page, $1,000.

Forty-second. I give to Walter F. Page, of Clinton, the sum of One Thousand Dollars ($1,000.).

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Charles A. Bartlett, $1,000.

Fortythird. I give to Charles A. Bartlett, of Lancaster, the sum of One Thousand Dollars ($1,000.).

John Linton, $1,000.

Forty-fourth. I give to John Linton, of Lancaster, the sum of One Thousand Dollars ($1,000.).

F. H. Damon, $1,000.

Forty-fifth. I give to F. H. Damon, of Melrose, the sum of One Thousand Dollars ($1,000.).

Sara E. Barker, $500.

Forty-sixth. I give to Miss Sara E. Barker, of Boston, the sum of Five Hundred Dollars ($500.).

John Nuttall, $500.

Forty-seventh. I give to John Nuttall, of Everett, the sum of Five Hundred Dollars ($500.).

Mrs. Frank Nullett, $200 a year during her life.

Forty-eighth. I give to Mrs. Frank Nullett, of Lancaster, the sum of Two Hundred Dollars ($200.) a year during her life.

Body to be cremated.

Forty-ninth. I direct that my body be cremated and that my ashes be buried in my lot at Lancaster.

Legacies to be free of any duty taxes, or succession duty.

The legacies in the articles of this Codicil are to be free of any duty, taxes, or succession duty, and any such tax which may be legally due on said legacies whether under laws now in force or under laws hereafter enacted, shall be paid out of my general estate.

In Witness Whereof I hereunto set my hand and seal and in the presence of three witnesses declare this to be a Codicil to my last Will, this fourth day of April, A. D. 1907.

EUGENE V. R. THAYER. [SEAL]

[fol. 48] On this fourth day of April, A. D. 1907, Eugene V. R. Thayer, of Lancaster, Massachusetts, signed the foregoing instrument in our presence, declaring it to be a Codicil to his last Will, and as witnesses thereto we three do now at his request, in his presence and in the presence of each other, hereto subscribe our names.

James L. Putnam, 60 State St. [Seal.] J. M. Paula Wallner, 60 State St. Boston. [Seal.] W. L. Putnam, 60 State St. Boston. [Seal.]

IN SUPREME COURT OF NEW YORK

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased

STATE TAX COMMISSION, Appellant,

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors, Respondents

STIPULATION AS TO CONCEDED FACTS

It Is Hereby Stipulated by and between the attorney for the Executors-Respondents and the attorney for the [fol. 49] State Tax Commission-Appellant, that the following facts are conceded for the purpose of the appeal herein, and that this stipulation be printed and made part of the record on appeal.

One: On July 8, 1911, one-third of the trust fund created by the Will of the decedent's father was segregated and thereafter was managed separately as a separate trust and said decedent herein received and retained for his own use during his life all of the income from the said one-third of the said trust fund, including the income upon the enhanced value of said one-third share.

Two: Annual accounts were separately filed with respect to the said one-third share of the said trust fund after the physical segregation thereof as aforestated in the Probate Court of Worcester County, Massachusetts. These annual accounts were rendered by all three Trustees, as Trustees of the said trust created under the Last Will and Testament of Eugene V. R. Thayer, Sr. A copy of one of the said annual accounts is annexed hereto and made a part hereof as though herein more fully incorporated. And

it is stipulated hereby that all other annual accounts similarly filed were in the same form and contained the same recitals.

Three: Fiduciary Income Tax Returns were made by the said three Trustees with respect to the said one-third share of the said trust separately from the Returns made [fol. 50] with respect to the remainder of the said trust.

Dated, New York, N. Y., March 13, 1940.

J. M. Hirsch, Attorney for State Tax Commission-Appellant. Willard A Mitchell, Attorney for Executors-Respondents.

Duplicate

R. L., Chap. 150, §2

The First Account of Eugene V. R. Thayer, John E Thayer and John E. Thayer, Jr., trustees under the will of Eugene V. R. Thayer late of Lancaster in the County of Worcester, Massachusetts deceased, for the benefit of Eugene V. R. Thayer.

This account is for the period beginning with the seventeenth day of October, A. D. 1917, and ending with the thirty-first day of December, A. D. 1917.

Said accountants charge themselves with the several accounts received, on account of principal, as stated in Schedule A, herewith exhibited,	$860,019.76
and ask to be allowed for sundry payments and charges, on account of principal, as stated in Schedule B, herewith exhibited,	$ 70,164.00
[fol. 51] Balance of principal invested as stated in Schedule C, herewith exhibited,	$789,855.16
They also charge themselves with the several amounts received on account of income, as stated in Schedule D, herewith exhibited,	$ 17,681.68
and ask to be allowed for sundry payments and charges on account of income, as stated in Schedule E, herewith exhibited,	$ 17,681.68
Balance of income,	$ None

John E. Thayer, Eugene V. R. Thayer, John E. Thayer, Jr., Trustees.

The undersigned, being all persons interested, having examined the foregoing account, request that the same may be allowed without further notice.

Eugene V. R. Thayer.

Boston January 30, 1918.

SUFFOLK, ss:

Then personally appeared the above-named accountants and made oath that the within account is just and true.

Before me, John C. Nuttall, Notary Public.

My Commission Expires May 7, 1920.

[fol. 52] COMMONWEALTH OF MASSACHUSETTS.
Worcester, ss:

At a Probate Court held at Worcester, — in said County, on the — day of — A. D. 19—.

The foregoing account having been presented for allowance, and vertified by the oath of the accountant, and all persons interested having been duly notified — having consented thereto in writing, and no objections being made thereto, and the same having been examined and considered by the Court.

It Is Decreed that said account be allowed.

——— ———, Judge of Probate Court.

[R. L. Chap. 150, §2]

Schedule A

	Dolls. Cts.
Amount of personal property, according to inventory, or	
Balance of principal, according to next prior account, ...	
Amounts received on account of principal, as follows:	
See attached sheet	

Schedule A

Balance of principal according to next prior a/c	816,769.95

Amounts received on acct. of principal as follows:

[fol. 53] GAIN ON SALES PERSONAL ESTATE

Oct. 19	$20,000. Kansas City, Ft. Scott & Memphis 4% Bonds	282.50
	130 shares U. S. Steel Corp. Pfd. Stock	3,120.
	92 " United Fruit Co. Stock	6,554.31
	200 " Great Northern Paper Co. Stock	33,000.
Nov. 15	For 34 shs. Submarine Signal Co. Stock, formerly considered of no value and now valued at	1.
	For 500 Myopia Hunt Club 4% Bond, formerly considered of no value, and now valued at	1.
26	Myopia Hunt Club 4% Bond sold	249.
Dec. 21	a/c Distribution of Assets Texas Land Syndicate #3	42.
	Total Schedule A	860,019.76

SCHEDULE B

Amounts paid out and charges on account of principal as follows:

LOSS ON SALE OF THE FOLLOWING SECURITIES

Oct. 19	$18,000. Georgia Ry & Electric Co. 5% Bonds	900.
	12,000. Kansas City, Memphis & Birmingham 4% Bonds	1,800.
	10,000. Kansas City Stock Yds. Co. of Mo. 5% Bonds	500.
	10,000. Union Elec. Light & Power Co. of St. Louis 5% Bonds	200.
[fol. 54]	12,000. N. Y., N. H., & Hartford R. R. Co. 6% Bonds	1,200.
	32,000. St. Louis-San Fran. Ry. Co. Adj. 6% Bonds	3,764.37
	50,000. St. Louis-San Fran. Ry. Co. Prior Lien 5% Bonds	10,000.
	33,500. Pere Marquette Ry. Co. 1st Mtg. 5% Bonds	3,802.16

	100 shares Union Pacific R. R. Co. Common Stock	162.50
Nov. 23	458 shares N. Y., N. H., & Hartford R. R. Co. Stock	47,259.73
	25 shares Technology Chambers Trust Stock	575.50
	Undivided interest in Lot in Mt. Auburn Cemetery, formerly carried in Schedule C. (Should not have been carried in personal property)	.34
	Total Schedule B	70,164.60

SCHEDULE C

	Cash		85,624.86

BONDS

$16,000.	Pere Marquette Ry. Co. 1st Mtg. Series B	4s	12,800.
3,000.	Ft. Street Union Depot Co. Notes	6%	2,700.
4,000.	Jacksonville Electric Co.	5s	3,600.
[fol. 55]			
23,500.	Kansas City, Memphis & Birmingham Inc.	5s	20,445.
4,000.	Kansas City & Memphis Ry. & Bridge Co.	5s	3,800.
3,000.	Penn. & Maryland Steel Co.	6s	3,000.
2,000.	Tennis & Racquet Club	5s	1,800.
4,000.	Terre Haute Electric Co.	5s	3,600.
5,000.	United States Steel Corp.	5s	4,150.
3,000.	Houston & Texas Central R. R. Co.	5s	3,260.
4,000.	Sierra & San Francisco Power Co.	6s	3,000.
2,000.	Kansas City Railways Co. 1st Mtg.	5s	1,800.
2,000.	do Series B	5s	1,800.
10,000.	do 2nd Mtg. Ser. A.	6s	9,200.
5,000.	Kansas City Light & Power Co. 2nd Mtg.	6s	4,600.
	Total Bonds	$79,555.	

STOCKS

312 shs.	Bankers Realty Investment Trust Stock	30,890.
230 "	Hamilton Woolen Co.	21,850.
500 "	Union Mills, Inc. Com.	23,500.

500	"	Atlantic Coast Fisheries Co. 1st Pfd.	50,000.
50	"	Boston Morris Plan Co.	5,500.
50	"	Quissett Mill	8,750.
250	"	Bankers Realty Co. Pfd.	
75	"	do Com.	25,000.
200	"	Merchants National Bank	60,000.
60	"	Indian Head Mills of Alabama	1,500.
1323	"	St. Mary's Mineral Land Co.	56,960.06
25	"	Osceola Consolidated Mining Co.	2,000.
[fol. 56]			
64	"	Winona Copper Co.	832.
34	"	Michigan Iron & Land Co.	.34
14	"	Inter-State National Bank, Kansas City	4,550.
38	"	National Safe Deposit Co., Chicago	2,711.43
9	"	Second National Bank of Boston	1,845.
27	"	American Trust Co., Boston	8,690.
30	"	New England Trust Co. "	10,500.
52	"	Old Colony Trust Co. "	12,308.83
67	"	The Midland Warehouse & Transfer Co.	6,700.
10	"	New England Kennel Club Pfd.	1.
226	"	American Tel. & Tel. Co.	29,342.
200	"	International Nickel Co. Common	5,125.
820	"	St. Louis-San Francisco Ry. Common	37,575.74
50	"	Chicago Junc. Rys. & Union Stock Yds. Co. Com.	7,047.92
100	"	Atchison, Topeka & Santa Fe Ry. Com.	10,012.50
66	"	Illinois Traction Co.	6,600.
26	"	do Common	0
14	"	Texas Land Syndicate #3	0
42	"	Texas Land Syndicate	0
75	"	Mass. Bonding & Insurance Co.	15,400.
25	"	Gloucester Trust	2,500.
225	"	Chicago, Wilmington & Franklin Coal Co. Pfd.	18,000.
27	"	Van Rensselaer Land Co.	.34
557	"	Kansas City Stock Yds. Co. of Maine Pfd.	44,560.
79	"	Kansas City Stock Yds. Co. of Maine Com.	3,950.
1033	"	New Mexico & Arizona Land Co.	0
27	"	Pere Marquette Ry. Prior Preference Stock	2,613.10

[fol. 57]

189	"	Pere Marquette Ry. Comm.	2,613.10
753	"	do Pfd.	56,445.88
100	"	Chicago, Milwaukee & St. Paul Ry. Pfd.	14,215.63
100	"	W. A. Slater Mills, Inc., Common	10,000.
34	"	Submarine Signal Co.	1.
712	"	Eastern Kentucky Railway Co. Common	.33
128	"	Pacific Copper Co.	.34
12	"	Naumkeag Copper Co.	.34
2105	"	Eastern Ky. Ry. Co. Pfd. (⅓ undiv. int. in)	.33
1/12		Undivided interest in Eastern Ky. Ry. Co. Extension of Rd. a/c	.34
		Undivided interest in Eastern Ky. Ry. Co. Loan a/c	4,547.69
		Isabel J. Butler Loan a/c	900.02
		Suspense	12,411.44
		Total Schedule C	789,855.16
		" " B Brought forward	70,164.60
		Total Schedules B and C	$860,019.76

Schedule D

Balance of Income according to next prior a/c 8,016.95

Amounts received on account of Income, as follows:

Oct. 17 Rec'd interest on notes of Eugene V. R. Thayer

[fol. 58]

$25,000.	3 mos. 8 d. @ 4%	$272.22	
20,000.	2 " 17 d. @ 5%	213.89	
34,000	1 mo. 5 d. @ 5%	165.27	651.38

19 Rec'd accrued interest 3m. 18d. on $18,000. Georgia Railway & Electric Co. 5% Bonds Sold ..... 270.

		Rec'd accrued interest 1m. 18d. on $12,000. Kansas City, Memphis & Birmingham 4% Bonds Sold	64.
		Rec'd accrued interest 18d. on $20,000. Kansas City, Ft. Scott & Memphis Railway 5% Bonds Sold	40.
		Rec'd accrued int. 2m. 18d. on $10,000. Kansas City Stock Yards Co. of Missouri 5% Bonds Sold	108.33
		Rec'd accrued interest 1m. 18d. on $5,000. American Telephone & Telegraph Co. Conv. 4½% Bonds Sold	30.
		Rec'd accrued interest 1m. 18d. on $10,000. Union Electric Light & Power Co., St. Louis 5% Bonds sold	66.67
		Rec'd accrued interest 3m. 18d. on $12,000. N. Y., N. H. & Hartford R. R. 6% Bonds Sold	216.
		Rec'd accrued interest 3m. 18d. on $50,000. St. Louis-San Francisco Ry. Prior Lien 5% Bonds Sold	750.
		Rec'd accrued interest 3m. 18d. on $33,500. Pere Marquette Railway Co. 1st Mtg. 5% Bonds Sold	502.50
Nov.	1	Rec'd coupons on the following bonds:	
		$5,000. United States Steel Corp. 5% Bonds	125.
[fol. 59]		4,000. Jacksonville Electric Co. 5% Bonds	100.
		Rec'd the following dividends:	
		225 shs. Chicago, Wilm. & Franklin Coal Co. Pfd.	337.50
		27 " Pere Marquette R. R. Co. Prior Pref. Stock	33.75
		25 " Osceola Consolidated Mining Co. Stock	50.
		557 " Kansas City Stock Yds. Co. of Me. Pfd.	696.25
		79 " Kansas City Stock Yds. Co. of Me. Com.	98.75
		38 " National Safe Deposit & Trust Co.	57.
		10 " New England Kennel Club Pfd.	20.
		Interest on bank deposits	32.71

15	Rec'd the following dividends:		
	52 shs. Ond Colony Trust Co.		156.
	25 " Technology Chambers Trust		50.
	50 " Quisset Mill Common		600.
19	26 " Illinois Trac. Co. Common6		19.50
22	Return of rent Box 141, Union Safe Deposit Vaults		8.33
Dec. 1	Rec'd the following dividends:		
	500 shs. Union Mills, Inc., Common Stock		500.
	60 " Indian Head Mills		180.
	100 " Atchison, Topeka & Santa Fe Common		150.
[fol. 60] 7	Rec'd of Trustees u/w N. Thayer, Sr. 1/18 of balance of income from Annuity Fund		328.67
	Rec'd of Merchants National Bank, int. on dep. Nov.		11.40
19	Rec'd of Trustees u/w N. Thayer, rents Chicago Estates		445.28
31	Rec'd interest on deposits Dec., Merchants Nat. Bank		24.88
	Balance in Tax Reserve Fund transferred to Income		2,940.43
	Refund of income tax withheld on coupon due Aug. 1st on $500. Myopia Hunt Club Bond		.40
	Total Schedule D		$ 17,681.68

Schedule E

Amounts paid out and charges on account of income as follows:

Nov. 1	Paid for stamps a/c transfer securities		84.72
30	" Rent of office, Nov. and Dec.		43.42
	" Miss S. E. Barker, clerical work		4.16
Dec. 10	" Lee, Higginson transfer tax on 100 Atchison, Topeka & Santa Fe Railway Com. Stock		2.00
	" Clayton C. Sweatt, wages December		50.

[fol. 61]

24	"	Rent camp site, Millbrook Lodge	33.34
	"	Insurance premium " "	83.51
	"	Allowances to William A. Marston and Alice R. Thayer	194.42
	"	Isabel J. Butler, 6 mos.	73.34
	"	Rent 49 Mass. Ave.	117.25
	"	Allowances to Helen B. Cram and Josephine S. Sprague	26.66
	"	Allowances to James E. Crone 3 mos.	250.00
	"	Trustees Commissions on income collected Oct. 17, 1917-Dec. 31, 1917, inclusive 5% on $7,339.01	366.95
31	"	Eugene V. R. Thayer balance of income to date	16,351.90
		Total Schedule E	17,681.68

Schedule F

Showing Changes in Investments

Receipts

	Amount overinvested per previous account		4,456.63
Oct. 17	Rec'd of Eugene V. R. Thayer payment of his notes:		
	Jan. 9, 1913	$25,000.	
	July 30, 1913	20,000.	
	Mar. 12, 1915	34,000.	79,000.

[fol. 62]

19	Rec'd from sale 130 shs. U. S. Steel Corp. Pfd. Stock		14,560.
	" " "	100 shs. Union Pacific R. R. Com. Stock	12,000.
	" " "	92 shs. United Fruit Co. Stock	11,132.
	" " "	200 shs. Great Northern Paper Co.	60,000.
	" " "	$18,000 Ga. Ry. & Elec. Co. 5% Bonds	16,200.

	"	"	" $12,000 K. C., Mem. & Birm. 4% Bonds	8,400.
	"	"	" $20,000 K. C., Ft. Scott & Mem. 4% Bonds	14,000.
	"	"	" $10,000 K. C. Stock Yds. Co. of Mo. 5% Bonds	9,500.
	"	"	" $5,000 American Tel. & Tel. Co. Conv. 4½% Bonds	5,000.
	"	"	" $10,000 Union Elec. Light & Power Co. of St. Louis 5% Bonds	9,000.
	"	"	" $12,000 N. Y., N. H. & Hartford 6% Bonds	10,800.
	"	"	" $32,000 St. Louis-San Francisco Ry. Cumulative Adjustment 6% Bonds	19,200.
	"	"	" $50,000 St. Louis-San Francisco Ry. Prior Lien 5% Bonds	40,000.
[fol. 63]				
	Rec'd from sale		$33,500 Pere Marquette Ry. Co. 1st Mtg. 5% Bonds	26,800.
23	"	"	" 458 shs. N. Y., N. H. & Hartford R. R. Co.	11,538.47
	"	"	" 25 shs. Technology Chambers Trust	1,299.50
26	"	"	" $500 Myopia Hunt Club 4% Bond	250.
30	"	"	" 300 shs. Merchants National Bank	82,500.
Dec. 21	"	"	distribution assets Texas Land Syndicate #3	42.
				426,765.34

Payments

Oct. 17	Paid for	500 shs. Union Mills, Inc. Common Stock	23,500.
	" "	500 shs. Atlantic Coast Fisheries Co. 1st Pfd. Stock	50,000.
	" "	50 shs. Boston Morris Plan Co. Stock	5,500.
19	" "	250 shs. Bankers Realty Investment Trust Stock	25,000.
	" "	230 shs. Hamilton Woolen Co. Stock	21,850.
	" "	500 shs. Merchants National Bank Stock	142,500.
	" "	50 shs. Quissett Mill Stock	8,750.
[fol. 64]			
	Paid for	250 shs. Bankers' Realty Co.) Pfd. Stock) 75 shs. Bankers' Realty Co.) Com. Stock)	25,000.
24	" "	62 shs. Bankers' Realty Investment Tr. Stock	5,890.
	" "	225 shs. Chicago, Wilm. & Franklin Coal Co. Pfd.	18,000.
	" "	100 shs. W. A. Slater Mills, Inc. Com. Stock	10,000.
	" "	40/100 sh. Pere Marquette Ry. Co. Prior Pref.	19.60
	" "	12/100 sh. Pere Marquette Ry. Co. Pfd. Stock	5.88
	" "	200 shs. International Nickel Co. Com. Stock	5,125.
	Cash	(uninvested principal)	85,624.86
			426,765.34

IN SURROGATE'S COURT FOR NEW YORK COUNTY.

OPINION OF THE SURROGATE

(Decision in Law Journal, October 5, 1939. By Mr. Surrogate Foley)

Estate of Eugene V. R. Thayer.—This is an appeal by the state tax commission from the order of December 1,

1938, fixing the estate tax on the appraiser's report. The ground of appeal is that the appraiser erroneously failed to [fol. 65] include as part of the taxable estate the value of property passing under the exercise by the testator of a power of appointment. The power to appoint by will was given to the testator in the will of his father, who died a resident of the State of Massachusetts. The property subject to the power consists of intangibles in the residuary trust established in Massachusetts under the father's will. The decedent died a resident of this State.

The sole question presented by this appeal is whether the recent decisions of the United States Supreme Court in Curry v. McCanless (vol. 83, L. Ed., Advance Opinions, 865), and Graves v. Elliott (83 *id.* 880) have overruled the determination of the courts of our state in Matter of Sandford (277 N. Y. 323); Matter of Canda (197 App. Div. 597); and Matter of Burch (160 Misc. 342), which held that the exercise by a resident donee of a power of appointment, created by a non-resident donor, is not taxable in this state. I hold that these latter authorities have not been nullified.

The recent Supreme Court cases are readily distinguishable from the New York authorities. In Curry v. McCanless the donor and donee of the power of appointment were one and the same person. That fact was emphasized by the court throughout the prevailing opinion of Mr. Justice Stone. In such circumstances the court held the power of appointment "as equivalent to ownership of the property subject to the power" (Citing Chanler v. Kelsey, 205 U. S. [fol. 66] 466, 51 L. ed., 882, 27 S. Ct., 550; Bullen v. Wisconsin, 240 U. S. 630, 60 L. ed., 835, 36 S. Ct., 473; Chase Nat. Bank v. United States, 278 U. S. 327, 338, 73 L. ed., 405, 409, 49 S. Ct., 126, 63 A. L. R., 388). Here the donor and donee were different persons. Whether the power of appointment was exercised, as in the McCanless case, or the powers reserved to the donor relinquished or extinguished at her death, as in Graves v. Elliott (*supra*), such power of appointment, modification or revocation is a property right and an appropriate subject of taxation by the domiciliary state of the donor of the power. The property in the possession of a corporate trustee in another state is likewise subject to the taxing powers of that state (Curry v. McCanless, *supra*).

In the proceeding here the donor was a resident of the State of Massachusetts. The facts are identical with those presented in Matter of Sandford (*supra*), in which the Court of Appeals held that neither the presence in this state of the certificates or instruments evidencing the intangible property, nor the removal of the residence of the trustee into this state afforded a basis for the imposition of a tax. The court based it- opinion in great part on the decision of the United States Supreme Court in Wachovia Bank & Trust Co. v. Doughton (272 U. S. 567). There the donor of the power of appointment died a resident of Massachusetts. After his death his daughter, the donee moved to North Carolina. Her will whereby she exercised [fol. 67] the power was admitted to probate in the latter state. In denying North Carolina the right to tax the property passing under the power the United States Supreme Court said, at page 575: "We think the assets of the trust estate established by the will of Haynes had no situs, actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control (Frick v. Pennsylvania, 268 U. S. 473)."

In discussing this subject of jurisdiction in its recent decision in Curry v. McCanless (*supra*), Mr. Justice Stone wrote: "Whether the appointee derives title from the donor under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee (Cf. Wachovia Bank & T. Co. v. Doughton, 272 U. S. 567, 71 L. ed., 413, 47 S. Ct., 202). There is no conflict here between the laws of the two states affecting the transmission of the trust property."

Thus the court did not overrule its determination in the Wachovia Bank & Trust Company case, but cited it without distinguishment. That authority must still be accepted as the law governing a determination of non-taxability under circumstances similar to those in the instant case. In [fol. 68] the face of the explicit ruling of the Court of Appeals in the Sandford case, which is thus far unchanged

by any contrary pronouncement of the Supreme Court, property passing under a power of appointment granted by a non-resident donor, and exercised by a resident donee, should not be subjected to double taxation. The appeal of the State Tax Commission is therefore denied.

Submit order on notice accordingly.

In Supreme Court of New York

Appellate Division—First Department

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Eugene V. R. Thayer, Deceased; State Tax Commission, Appellant,

Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors, Respondents

Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act It Is Hereby Stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which [fols. 69-70] the Court below acted in making said order appealed from and the whole thereof, now on file in the office of the Clerk of the Surrogate's Court of the County of New York; and certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated: New York, April 22, 1940.

J. M. Hirsch, Attorney for Appellant; Willard A. Mitchell, Attorney for Respondents.

[fol. 71] In Surrogates' Court, New York County

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Eugene V. R. Thayer, Deceased; State Tax Commission, Appellant,

Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors, Respondents

Notice of Appeal to the Court of Appeals

Please Take Notice that the State Tax Commission of the State of New York hereby appeals to the Court of Appeals from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of the Appel-

late Division of the Supreme Court, First Judicial Department, on January 24, 1941, which order unanimously affirmed the final order of the Surrogates' Court of the County of New York entered in the office of the Clerk of said Surrogates' Court on the 17th day of October, 1939, and a certified copy of which order of said Appellate Division was filed in the office of the Clerk of said Surrogates' Court on January 27, 1941, and from the order of said Surrogates' Court made and entered in the office of the Clerk of said Surrogates' Court on February 14, 1941, pursuant to said order of affirmance of said Appellate Division; and this appeal is from the whole and each and every part of said order of affirmance of said Appellate Division and from the [fol. 72] whole and each and every part of said order of the Surrogates' Court entered pursuant to said order of affirmance of said Appellate Division.

Dated: New York, N. Y., February 21, 1941.

Yours, etc., Jerome M. Hirsch, Attorney for State Tax Commission, Appellant, 80 Centre Street, New York, N. Y.

To: Willard A. Mitchell, Attorney for Executors, Respondents, 141 Broadway, New York, N. Y.; George T. Campbell, Esq., Clerk, Appellate Division, Supreme Court, First Judicial Department; George Loesch, Esq., Clerk, Surrogates' Court, New York County.

[fol. 73] In Supreme Court of New York, Appellate Division—First Department

Present: Hon. Francis Martin, Presiding Justice; Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Eugene V. R. Thayer, Deceased; State Tax Commission, Appellant,

Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors, Respondents

9753

Order of Affirmance on Appeal from Surrogate

Order Appealed From—January 24, 1941

An appeal having been taken to this Court by the State Tax Commission of the State of New York, from an order

of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 17th day of October, 1939, affirming an order entered on December 1, 1938, fixing and assessing an estate tax in the estate of the decedent herein, and said appeal having been argued by Mr. Mortimer M. Kassell of counsel for the appellant, and by Mr. Thomas A. Ryan of counsel for the respondents, and a [fol. 74] brief having been filed by Mr. Heber Smith on behalf of Smith & Stanley and Merchant, Olena & Flagg, as *amici curiae;* and due deliberation having been had thereon,

It is hereby unanimously Ordered and Adjudged that the order so appealed from be and the same is hereby affirmed with costs.

Enter.

F. M.

IN SURROGATE'S COURT FOR NEW YORK COUNTY

Present: Hon. James A. Foley, Surrogate

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of EUGENE V. R. THAYER, Deceased

ORDER ON REMITTITUR OF APPELLATE DIVISION—February 13, 1941

An appeal having been taken to the Appellate Division of the Supreme Court, First Judicial Department, by notice of appeal, dated November 13, 1939, by the State Tax Commission from the order made and entered in the above-entitled proceeding in the office of the Clerk of the Surrogate's Court of the County of New York, on October 17, 1939, which order affirmed an order theretofore made and [fol. 75] entered herein on December 1, 1938, fixing and assessing an Estate Tax in the Estate of the decedent herein, under Article 10-C of the Tax Law, and said State Tax Commission having appealed from each and every part of said order of October 17, 1939, and said appeal having duly come on to be heard before said Appellate Division of the Supreme Court, First Judicial Department, and said Court having unanimously affirmed the order so appealed from with costs, and a certified copy of said order having been filed in the office of the Clerk of this Court, together with the remittitur, on January 27, 1941.

Now, on reading and filing the annexed notice of settlement with due proof of service thereof upon the attorneys of record in this proceeding and the remittitur herein;

And, on motion of Willard A. Mitchell, attorney for the Executors, it is hereby

Ordered, that the order of the Appellate Division of the Supreme Court, First Judicial Department, unanimously affirming the order of this Court made and entered herein on October 17, 1939 affirming the order of this Court made and entered on December 1, 1938 fixing and assessing the Estate Tax in the Estate of the decedent herein under Article 10-C of the Tax Law, be and the same hereby is made the order of this Court.

James A. Foley, Surrogate.

[fol. 76] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of Albany, ss.:

Mortimer M. Kassell, being duly sworn, deposes and says:

I am an attorney at law and Deputy Commissioner and Counsel, State Tax Commission, appellant herein, and am familiar with the proceedings heretofore had herein. No opinion was filed by the Appellant Division in making its order of January 24, 1941, affirming the final order of the Surrogates' Court, New York County, entered on October 17, 1939, in the proceeding entitled "In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Eugene V. B. Thayer, Deceased."

Mortimer M. Kassell.

Sworn to before me this 25th day of February, 1941.
Mary C. Fitzpatrick, Notary Public, Albany County.

STIPULATION WAIVING CERTIFICATION

It Is Hereby Stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order of the Appellate Division appealed from, and the order of the Surrogates' Court entered on the remittitur of [fol. 77] the Appellate Division, all of which are now on file in the office of the Clerk of the Surrogates' Court of

the County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act is hereby waived.

Dated: New York, N. Y., March 3rd, 1941.

Jerome M. Hirsch, Attorney for State Tax Commission; Willard A. Mitchell, Attorney for Executors.

[Clerk's certificate to foregoing transcript omitted in printing.]

[fol. 78] In Court of Appeals of New York

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of June, in the year of our Lord one thousand nine hundred and Forty-one, before the Judges of said court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding; John Ludden, Clerk

Remittitur—June 19th, 1941

[fol. 79] In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Eugene V. R. Thayer, Deceased.

Be it remembered, that on the 5th day of April in the year of our Lord one thousand nine hundred and forty-one, State Tax Commission of the State of New York, the appellant in this cause, came here unto the Court of Appeals, by Jerome M. Hirsch, its attorney, and filed in the said court a notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department and Carl J Schmidlapp and another as executors, the respondents in said cause, afterwards appeared in said Court of Appeals by Willard A. Mitchell, their attorney

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Mortimer M. Kassell, of counsel for the appellant and by Mr. Thomas A. Ryan, of counsel for the respondents brief filed by amici curiae and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

A question under the Federal Constitution was presented and necessarily passed upon. The appellant contended that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in this proceeding, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that the statute aforesaid, as sought to be applied in [fol. 80] this proceeding, is violative of, and repugnant to, the Fourteenth Amendment of The Constitution of the United States.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, there to be proceeded upon according to law. Therefore, it is considered that the said order be affirmed with costs, &c., as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates thereof, & c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, June 19, 1941.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal)

[fol. 81] In Surrogate's Court for New York County

Present: Hon. James A. Foley, Surrogate

P. 121-1937

In the Matter of The Appraisal under the Estate Tax Law of the Estate of Eugen' V. R. Thayer, Deceased

Order on Remittitur—July 10, 1941

An appeal having been taken in the Court of Appeals by the State Tax Commission from an order of the Appel-

late Division of the Supreme Court, First Judicial Department, entered in the Office of the Clerk of the said Court on January 24, 1941, unanimously affirming a final order of the Surrogate's Court of the County of New York, duly entered in the Office of the Clerk of said Surrogate's Court on October 17, 1939, a certified copy of which order of said Appellate Division was filed in the Office of the Clerk of said Surrogate's Court on January 27, 1941, and from the order of said Surrogate's Court made and entered in the Office of the Clerk of said Surrogate's Court on February 14, 1941, pursuant to said order of affirmance of said Appellate Division, and the State Tax Commission of the State of New York having appealed from the whole and each and every part of said order of affirmance of said Appellate Division, and from the whole and each and every [fol. 82] part of said order of the Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division, and said appeal having duly come on to be heard before the Court of Appeals of the State of New York and said Court having unanimously affirmed the order appealed from, with costs, by order duly made and filed in the Office of the Clerk of the Court of Appeals of the State of New York on June 19, 1941, and a certified copy of said order together with the remittitur from the Court of Appeals having been duly filed in the office of this Court and the costs of the Executors having been duly taxed,

Now, on reading and filing the remittitur herein,

And, on motion of Willard A. Mitchell, Esq., attorney for the Respondents-Executors, it is hereby

Ordered, that the said order of the Court of Appeals, unanimously affirming the said order of the Appellate Division, dated the 24th day of January, 1941, made the order of this Court by order made and entered herein on February 14, 1941, unanimously affirming the order of this Court made and entered herein on October 17, 1939, affirming the order of this Court made and entered on December 1, 1938 affixing and assessing the Estate Tax on the Estate of the decedent herein under Article 10-C of the Tax Law, be and the same hereby is made the order of this Court and it is

Further Ordered that the Respondents-Executors herein recover of the State Tax Commission of the State of New York the sum of $167.68, being the costs and disbursements of said Respondents as determined herein.

James A. Foley, Surrogate.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed October 27, 1941

The petition herein for a writ of certiorari to the Surrogates Court of the County of New York, State of New York, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 45,932. New York, Surrogates Court of the County of New York. Term No. 604. Mark Graves, John P. Hennessey and Joseph M. Mesnig, as Commissioners Constituting the State Tax Commission of the State of New York, Petitioners, vs. Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors of the last Will and Testament of Eugene V. R. Thayer, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed September 11, 1941. Term No. 604, O. T., 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 604

MARK GRAVES, JOHN P. HENNESSEY AND JOSEPH M. MESNIG, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

vs.

CARL J. SCHMIDLAPP AND ELIZABETH E. GORRIE, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EUGENE V. R. THAYER, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SURROGATES COURT OF THE COUNTY OF NEW YORK OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

MORTIMER M. KASSELL,
Counsel for Petitioners.

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Subject Index.

Table of Cases Cited.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 604

MARK GRAVES, JOHN P. HENNESSEY AND JOSEPH M. MESNIG, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Petitioners,

vs.

CARL J. SCHMIDLAPP AND ELIZABETH E. GORRIE, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EUGENE V. R. THAYER, DECEASED.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Mark Graves, John P. Hennessey and Joseph M. Mesnig, as Commissioners constituting the State Tax Commission of the State of New York, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The decedent, Eugene V. R. Thayer, died a resident of the State of New York on January 1, 1937 (R. 29). His will was admitted to probate by the Surrogates' Court of New York County, and letters of administration issued to Carl J. Schmidlapp and Elizabeth E. Gorrie (R. 30). By Paragraph Fifth of said will he exercised a general power of appointment given him under his father's will (R. 77-78).

The trust fund over which the decedent exercised the power of appointment, had been created by the will of his father, Eugene V. R. Thayer, Sr., who died a resident of Massachusetts on December 20, 1907, and whose will was admitted to probate in Worcester County of that State (R. 52). Under the father's will his residuary estate was bequeathed in trust with income therefrom payable to his widow for life and then to his three children for their lives with power in Eugene V. R. Thayer, decedent herein, to appoint by will his share of the principal (R. 104-5).

Decedent was one of three trustees under his father's will of the trust fund and the fund was originally managed as a unit. However, on July 8, 1911, decedent's one-third share of the fund was segregated, with the approval of the other trustees and adult beneficiaries, and was thereafter managed by him as a separate trust although under the nominal trusteeship of all three trustees (R. 53). In 1918, decedent moved to New York, bringing with him his share of the trust fund. While in New York decedent kept the physical evidences of his share of the fund in a safe deposit box in New York City (R. 69). In 1929 he moved to Illinois where he remained until 1934 still having with him his share of the trust fund (R. 71). In 1934 he returned to New York with said share where he remained with said share until his death in 1937 (R. 69-71). Decedent ap-

pointed said share to his wife. Decedent's share of the trust fund was wholly comprised of intangible personal property (R. 38-51). The appointed property has been treated by decedent's executors in all respects as part of the decedent's estate (R. 65).

The State Tax Commission of New York contended before the Surrogate on its appeal to him from a *pro forma* taxing order, that the appointed property should be included in decedent's gross estate for purposes of the estate tax imposed by Article 10-C of the Tax Law, under the provisions of subdivision 7 of section 249-r of said law (added by Chapter 710, Laws 1930, and amended by Chapter 639, Laws of 1934). A copy of said section, so far as relevant, is annexed as Appendix A. The respondents contended throughout that New York had no jurisdiction to tax the exercise of power since it had been created by a nonresident donor and that said subdivision violated the Fourteenth Amendment.

The Surrogates' Court of the County of New York excluded the appointed property from decedent's gross estate, upon the authority of *Wachovia Bank & Trust Company* v. *Doughton*, 272 U. S. 567 (R. 10-21, 192-202). The action of said court was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department (R. 217-220), and by the Court of Appeals. The remittitur of the Court of Appeals states that "A question under the Federal Constitution was presented and necessarily passed upon. The appellant contended that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in the proceeding, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that the statute aforesaid, as sought to be applied in this proceeding is violative of,

and repugnant to the Fourteenth Amendment of the Constitution of the United States."

B.

Question Presented.

Whether the Fourteenth Amendment prohibits a State from imposing an estate tax with respect to intangible personal property passing under the testamentary exercise by a resident decedent of a general power of appointment, where the power had been created by a nonresident and said property is held in trust and administered within the taxing State.

C.

Reasons Relied on for Allowance of Writ.

1. The decision of the Court of Appeals that the statute as sought to be applied herein violates the Fourteenth Amendment is not in accord with the decisions of this Court upholding the power of the State of domicile of the owner of intangible personal property to subject such property to death taxation, or the decisions of this Court upholding the power of the State where intangible personal property is held and administered by trustees, to subject such property to death taxation. The decision is contrary to principles announced in *Curry* v. *McCanless*, 307 U. S. 357; *Graves* v. *Elliott*, 307 U. S. 383; *Pearson* v. *McGraw*, 308 U. S. 313; and *Stewart* v. *Commonwealth of Pennsylvania*, 338 Pa. 9, affirmed 85 L. Ed. 389.

2. The question of whether the domicile of a donee of a power of appointment has jurisdiction to impose a death tax with respect to intangible personal property passing under such exercise, where the power was created by a nonresident of the taxing State, is one of general importance

and concern to the States and to taxpayers. It should be decided by this Court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari may be issued directed to the Surrogates' Court of the County of New York, commanding that court to certify and send to this Court on the day certain to be therein specified, a full and complete transcript of the record and all proceedings of said Surrogates' Court in this action which was entitled in said court: "In the Matter of the Estate Tax upon the Estates of Eugene V. R. Thayer, Deceased," to the end that said case may be reviewed and determined by this Court, as provided by law, that the decree of said court be reversed, and that your petitioners have such other and further relief as to this Honorable Court may seem just and proper.

MARK GRAVES,
JOHN P. HENNESSEY,
JOSEPH M. MESNIG,
As Commissioners Constituting the State Tax Commission of the State of New York,
MORTIMER M. KASSELL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

There was no opinion by the Appellate Division or the Court of Appeals. The opinion of the Surrogates' Court (R. 192-202) is reported in 172 Misc. at page 426.

Jurisdiction.

The decree of the Surrogates' Court herein sought to be reviewed was entered on July 10, 1941, upon the remittitur of the Court of Appeals of the State of New York dated June 19, 1941.

The judgment of the Court of Appeals was rendered in a cause wherein there was directly involved the validity, under the Fourteenth Amendment of the Constitution of the United States, of paragraph 7 of section 249-r of the Tax Law of the State of New York.

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, § 1, 43 Stat. 937 (§ 344, Title 28, U. S. C. A.) and Act of February 13, 1925, c. 229, § 8, 43 Stat. 940 (§ 350, Title 28, U. S. C. A.).

Statement of the Case.

The facts are fully set forth in the petition herein (see pp. 2-4).

Specification of Errors.

1. The Court of Appeals erred in applying the principles established by this Court in its applicable decisions to the facts in this proceeding.

2. The Court of Appeals erred in holding that the imposition of a State estate tax, with respect to intangible personal property passing under the testamentary exercise

of a power of appointment by a resident decedent, where the power had been created by a nonresident, was in violation of the Fourteenth Amendment to the United States Constitution.

3. The Court of Appeals erred in not holding that subdivision 7 of section 249-r of the Tax Law of the State of New York as herein applied was valid.

Summary of Argument.

A. The Court of Appeals did not give effect to the applicable decisions of this Court, since the Fourteenth Amendment does not prohibit the State of domicile of a donee of a power of appointment over intangible personal property, from imposing an estate tax with respect to the testamentary exercise of such power, even though it had been created by a nonresident donor.

B. The Court of Appeals did not give effect to the applicable decisions of this Court, since the Fourteenth Amendment does not prohibit the State of domicile of a donee of a power of appointment over intangible personal property, from imposing an estate tax with respect to the testamentary exercise of such power, even though it had been created by a nonresident donor, where such property is held in trust within the taxing State.

Point I.

The decision by the Court of Appeals is not in accord with the applicable decisions of this Court.

Article 10-C of the Tax Law of the State of New York imposes an estate tax upon the transfer of the net estate of decedents. It was modeled on the estate tax imposed by the United States Revenue Act of 1926, and by section 249-r provides for the determination of the gross estate

by including therein various items. By paragraph 7 of said section, there is required to be included in the gross estate, the value of all property "passing under a general power of appointment exercised by the decedent (a) by will."

There is no question that section 249-r of the Tax Law by its terms requires the inclusion in the gross estate of decedent of the property which passed under his testamentary exercise of the general power of appointment.

It is clear that property passing under the exercise of a power of appointment may be included in the measure of an estate tax. The power to transmit property by way of a power of appointment is equivalent, for purposes of taxation, to an absolute power of disposition. The death of the donee of a power effects a shifting of economic benefits in property by which the appointees acquire economic interests therein, justifying the imposition of a death tax.

Whitney v. *State Tax Commission*, 309 U. S. 530;
Curry v. *McCanless*, 307 U. S. 357;
Porter v. *Commissioner*, 288 U. S. 436;
Chanler v. *Kelsey*, 205 U. S. 466;
Orr v. *Gilman*, 183 U. S. 278.

The question presented here is whether the Fourteenth Amendment prohibits a State from imposing a tax in the estate of a resident decedent in respect of intangible personal property which passed under his exercise of a general power of appointment, where the power had been created by a nonresident decedent. The Court of Appeals has concluded that a State is so prohibited.

The conclusion of the Court of Appeals ignores the principle, recently reaffirmed, that the transfer at death of intangible personal property is subject to tax at the domicile of the "owner"—the person possessing the power of

disposition—since it is the domicile which affords protection and opportunities and which confers benefits upon him.

Curry v. *McCanless, supra,* 307 U. S. 357;
Graves v. *Elliott,* 307 U. S. 383;
Pearson v. *McGraw,* 308 U. S. 313.

In *Curry* v. *McCanless, supra,* this Court, in upholding the power of Tennessee to tax the testamentary exercise by a resident decedent of a power of appointment over a fund held in trust in Alabama, said (pp. 366-7):

> "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax."

In *Graves* v. *Elliott, supra,* a New York decedent had a power of revocation over a trust of intangible personal property held in Colorado. In upholding the power of New York to subject to the estate tax, the relinquishment of such power at death, it was said (p. 387):

> "As in the case of any other intangibles which she possessed, control of her person and estate at the place of her domicile and her duty to contribute to the support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death."

In *Pearson* v. *McGraw, supra,* this Court upheld the right of Oregon to impose a tax on a transfer by a resident of property held in Illinois, saying (p. 318):

> "Accordingly, the transfer was taxable on the authority of *Curry* v. *McCanless, supra,* and related cases. For constitutionally the property was 'within the jurisdiction of the state' of Oregon since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner."

To the same effect, *Van Dyke* v. *Wisconsin Tax Comm.*, 311 U. S. 605.

Insofar as the jurisdiction of New York to impose a tax is founded solely on the fact that the decedent was domiciled therein at the time of his death, it is opposed to the decision in *Wachovia Bank and Trust Co.* v. *Doughton*, 272 U. S. 567. Petitioners submit that, as indicated by the dissenting opinion of Mr. Justice Holmes in that case, it cannot stand with *Bullen* v. *Wisconsin*, 240 U. S. 625. The recent affirmance of the *Bullen* case by *Graves* v. *Elliott, supra,* 307 U. S. 383, requires a reconsideration of the conclusion in the *Wachovia* case.

The decision by the Court of Appeals is contrary to the decisions of this Court for a wholly different reason. Not only has this Court upheld the taxing power of the State of domicile of the owner, but it has also upheld the taxing power of the State where intangible personal property is held in trust and administered. Since the intangible personal property here in question was held in trust in New York and administered by the decedent as trustee in New York, the denial by the Court of Appeals of the power to tax is not in accord with the applicable decisions of this Court.

Curry v. *McCanless, supra,* 307 U. S. 357;
Graves v. *Elliott, supra,* 307 U. S. 383;
Safe Deposit and Trust Co. v. *Virginia*, 280 U. S. 83.

In the *Curry* case this Court also upheld the power of Alabama to impose a death tax with respect to intangible personal property held in the possession of the trustees in that State, saying (p. 370):

> "This Court has never denied the constitutional power of the trustee's domicile to subject them to property taxation. *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; see cases collected in 30 Columbia Law Rev. 530; 2 Cooley, Taxation (8th ed.), § 602. And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state."

Hence, whether grounded on jurisdiction over the person or jurisdiction over the property, the decisions of this Court clearly uphold the power of New York to impose the tax here questioned.

Point II.

This petition presents a question of general importance meriting the consideration of this Court.

In 1926 in *Wachovia Bank & Trust Company* v. *Doughton*, 272 U. S. 567, a majority of this Court held that the State of a donee's domicile was without power to impose a death tax upon the exercise of a power of appointment over intangible personal property where the power had been created by a nonresident donor, upon the ground that such property had "no situs, actual or constructive" in the taxing State. This limitation on the taxing power of States has been of major importance to State revenues since the statutes of over thirty States by their terms assert a tax

on the exercise of a power of appointment.* Since that decision these States have been without power to tax where the power was created by a nonresident donor. However, the decisions in *Curry* v. *McCanless* and *Graves* v. *Elliott* have raised grave doubts in the minds of State taxing authorities, taxpayers, their representatives and academic writers on the question. Thus, the Attorney General of Kentucky (Commerce Clearing House Inheritance, Estate and Gift Tax Service, Supplemental Volume, New Matters, 1938-1940, Par. 8399) has held in effect that the *Curry* case has overruled the *Wachovia* case. Similarly, the doubts have been otherwise expressed. In 53 *Harvard Law Review* 1013, at page 1017, it is said in reference to the *Wachovia* case:

> "Though not overruled expressly, in view of the *ratio decidendi* of *Curry* v. *McCanless*, this decision appears no longer to be law."

In 38 *Michigan Law Review* 81, it is said of the *Wachovia* case that it

> "is virtually overruled by *Curry* v. *McCanless* and *Graves* v. *Elliott*."

In 14 *St. Johns Law Review* 195, at page 199, it is said:

> "Because of the holdings in the instant cases (referring to *Curry* v. *McCanless* and *Graves* v. *Elliott*), the effect of those decisions which defeated double taxation has been considerably weakened. Consequently, the *Wachovia* and the *Safe Deposit and Trust Company*

---

* Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin (California and Massachusetts under qualified circumstances), (Commerce Clearing House Inheritance, Estate and Gift Tax Service, Seventh Edition, pp. 81,029, 81,030).

cases are in a questionable light, and it appears as if the *Bullen* v. *Wisconsin* case is once more acceptable law."

In 25 *Cornell Law Quarterly* 642, at page 645, the writer concludes:

> "As a result of the decision in *Curry* v. *McCanless* we may expect increased taxation by the state of the donee's domicile. The line of cases following the *Wachovia Bank* case, of which *Matter of Thayer* (referring to the decision of the Surrogate in the instant proceeding) is the latest, seems destined to be overruled."

In the present state of the law, great confusion exists. Taxing authorities are uncertain how to protect State revenues, and persons desiring to create or exercise powers of appointment are also without a reliable guide for their conduct. The orderly administration of the tax laws of the several States, the protection of State revenues, and the interests of individual citizens all make it imperative that the question in this proceeding be answered by this Court at the earliest possible moment.

Conclusion.

Petitioners pray that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

MORTIMER M. KASSELL,
Counsel for Petitioners.

APPENDIX A.

§ 249-r. Gross estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):

* * * * * * *

7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, or (c) by deed under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 604.

MARK GRAVES, JOHN P. HENNESSEY and JOSEPH M. MESNIG, as Commissioners, Constituting the State Tax Commission of the State of New York,

Petitioners,

vs.

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors of the Last Will and Testament of EUGENE V. R. THAYER, Deceased.

BRIEF FOR PETITIONERS.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 604.

MARK GRAVES, JOHN P. HENNESSEY and JOSEPH M. MESNIG, as Commissioners, Constituting the State Tax Commission of the State of New York,

Petitioners,

vs.

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors of the Last Will and Testament of EUGENE V. R. THAYER, Deceased.

BRIEF FOR PETITIONERS.

Opinions of the Court Below.

The opinion of the Surrogates' Court of the County of New York is reported at 172 Misc. 426. No opinion was written either by the Appellate Division of the Supreme Court or by the Court of Appeals of the State of New York.

Jurisdictional Grounds of the Writ of Certiorari.

(1) The date of the order to be reviewed is July 10, 1941 and said order is printed at R. 54-56.

(2) The Court's jurisdiction is founded on the fact that the respondents asserted in all the Courts below, that for New York to impose its estate tax with respect to the exercise of a testamentary power of appointment by the decedent over intangible personal property was a deprivation of property without due process of law under the Fourteenth Amendment of the Constitution of the United States, because the power had been created by a non-resident of that state. The Surrogates' Court of New York County excluded the appointed property from decedent's gross estate upon the authority of *Wachovia Bank and Trust Co. v. Doughton*, 272 U. S. 567 (R. 46-49). The Appellate Division of the Supreme Court unanimously affirmed (R. 50-51). The remittitur of the Court of Appeals, dated June 19, 1941, states, in part, (R. 54):

> "A question under the Federal Constitution was presented and necessarily passed upon. The appellant contended that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in this proceeding, is not violative of, or repugnant to, the Fourteenth Amendment of the Constitution of the United States. This Court held that the statute as aforesaid, as sought to be applied in this proceeding is violative of, and repugnant to, the Fourteenth Amendment of The Constitution of the United States."

(3) Jurisdiction of this Court is invoked under section 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 937 (§344, Title 28, U. S. C. A.), and Act of February 13, 1925, c. 229, §8, 43 Stat. 940 (§350, Title 28, U. S. C. A.).

(4) The following cases sustain the jurisdiction of this Court:

Carpenter et al. v. Pennsylvania, 17 How. 456;
Bullen v. Wisconsin, 240 U. S. 625;

Rhode Island Hospital Trust Co. v. Doughton, 270 U. S. 69;
Public Utilities Commission of Rhode Island et al. v. Attleboro Steam & Electric Company, 273 U. S. 83;
Blodgett v. Silberman, 277 U. S. 1;
Virginia v. Imperial Coal Sales Co., Inc., 293 U. S. 15;
Graves v. Elliott, 307 U. S. 383.

Statement of the Case.

This case presents the question of whether a statute of the State of New York which includes in a resident decedent's gross estate, for purposes of its estate tax, intangible personal property passing under the exercise by will by such decedent of a general power of appointment created by a nonresident, is repugnant to the Constitution of the United States.

The decedent, Eugene V. R. Thayer, died a resident of the State of New York on January 1, 1937 (R. 6). His will was admitted to probate by the Surrogates' Court of New York County, and letters of administration issued to Carl J. Schmidlapp and Elizabeth E. Gorrie (R. 6). By paragraph "Fifth" of his will, he exercised a general power of appointment given him under his father's will (R. 10).

The trust fund over which the decedent exercised the power of appointment had been created by the will of his father, Eugene V. R. Thayer, Sr., who died a resident of Massachusetts on December 20, 1907, and whose will was admitted to probate in Worcester County of that State (R. 10). Under the father's will, his residuary estate was

bequeathed in trust with income therefrom payable to his widow for life and then to his three children for their lives with power in Eugene V. R. Thayer, decedent herein, to appoint by will his share of the principal (R. 22).

Decedent was one of the three trustees under his father's will of the entire trust fund and the fund was originally managed as a unit. However, on July 8, 1911, decedent's one-third share of the fund was segregated with the approval of the other trustees and adult beneficiaries, and was thereafter managed by him as a separate trust, although under the nominal trusteeship of all three trustees (R. 10). In 1918 decedent moved to New York bringing with him his share of the trust fund. While in New York decedent kept the physical evidences of his share of the fund in a safe deposit box in New York, N. Y. In 1929 he moved to Illinois where he remained until 1934 still having with him his share of the trust fund. In 1934 he returned to New York, N. Y., with said share where he remained with it until his death in 1937 (R. 14). Decedent appointed said share to his wife. Decedent's share of the trust fund consisted wholly of intangible personal property and was valued at $1,066,307.99 (R. 8-10). The appointed property has been treated by decedent's executors in all respects as part of decedent's estate (R. 13).

The Surrogates' Court of the County of New York, excluded the appointed property from the gross estate of the decedent for purposes of the estate tax imposed by Article 10-C of the Tax Law of the State of New York (R. 2-3, 46-49). The order of said Surrogates' Court was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department (R. 50-51), and the State Tax Commission ap-

pealed to the Court of Appeals of the State of New York (R. 49-50). The Court of Appeals affirmed and remitted the matter to said Surrogates' Court (R. 53-54), which thereupon made the order here under review excluding the value of the appointed property from the decedent's gross state (R. 54-55). This Court granted certiorari on October 27, 1941 (R. 56).

Specifications of Errors.

The petitioners herein allege that the Surrogates' Court of New York County erred in determining, in accordance with the decision of the Court of Appeals, that the State of New York is without power, under the Fourteenth Amendment of the Constitution of the United States, to impose an estate tax with respect to intangible personal property passing under the testamentary exercise by a resident decedent of a general power of appointment where the power had been created by a nonresident.

The petitioners herein allege that the Surrogates' Court of New York County erred in determining, in accordance with the decision of the Court of Appeals, that the State of New York is without power, under the Fourteenth Amendment of the Constitution of the United States, to impose an estate tax with respect to intangible personal property passing under the testamentary exercise by a resident decedent of a general power of appointment where the property is held in trust and administered within the taxing state.

Preliminary Statement.

The Tax Law of the State of New York, by section 249-n thereof, imposes an estate tax "upon the transfer of the

net estate" of resident decedents. Said tax is modeled after the Federal estate tax imposed by the United States Revenue Act of 1926. Section 249-r of the Tax Law provides for determining the gross estate by including the value of various items of property. By section 249-s, various deductions are allowed from the gross estate for the purpose of determining the net estate. The tax is imposed on the net estate at the graduated rates provided for in section 249-n of the Tax Law.

By paragraph 7 of said section 249-r, there is required to be included in the gross estate, the value of property passing under the exercise by will of a power of appointment. It is not disputed that, under the terms of said paragraph, the property passing under the exercise by the decedent includible in his gross estate.

Summary of Argument.

1. A decedent who possesses a testamentary power of appointment is properly considered as the owner of the appointive property, since his death occasions the shifting of economic benefits in such property in the same way as it would if he had owned the property in fee.

2. The due process clause of the Fourteenth Amendment to the United States Constitution does not prohibit New York from imposing an estate tax with respect to intangible personal property passing under the exercise of a power of appointment by a resident donee, even though the power had been created by a nonresident, since such donee received benefits and protection from New York.

3. Since the appointive property was held and administered in New York, the due process clause of the Fourteenth

Amendment to the United States Constitution does not prohibit New York from imposing its estate tax with respect to such property.

FIRST.

The decedent was, for purposes of taxation, the "owner" of the appointed property.

Article 10-C of the New York Tax Law is an estate tax modeled after the death tax imposed by the United States. It is a tax on the shifting of the economic benefits in property which is occasioned by the person's death, and is graduated in accordance with the amount of property so transferred. It is not necessary that such property be owned by the decedent but only that his death be the occasion by which economic benefits therein are shifted. Thus, it has been held proper to include in a decedent's gross estate, for purposes of an estate tax, the proceeds of life insurance (*Chase National Bank v. United States*, 278 U. S. 327); the full value of property in which the decedent was a joint tenant (*United States v. Jacobs*, 306 U. S. 363); the full value of property in which the decedent was a tenant by the entirety (*Tyler v. United States*, 281 U. S. 497); the value of property in a trust subject to a limited power to alter, amend or revoke (*Bullen v. Wisconsin*, 240 U. S. 625; *Porter v. Commissioner*, 288 U. S 436). By the same reasoning, the constitutional propriety of subjecting to death taxation property passing under the exercise of a testamentary power of appointment, general or limited, created by another was determined by this Court in *Whitney v. State Tax Commission*, 309 U. S. 530; *Orr v. Gilman*, 183 U. S. 278; *Chanler v. Kelsey*, 205 U. S. 466. These cases recognized that it is the donee's act which

completes the transfer of the property from the dead to the living.

At the death of the decedent herein he had the right, which he exercised, to dispose of his share of the trust fund created under the will of his deceased father. In so far as decedent's power to direct the passing of the property from himself to his survivors was concerned, it was absolutely immaterial whether the decedent owned the property outright or only had a power of appointment over it. His death occasioned the shifting of the economic benefits in such property in the same way that it caused the shifting of the economic benefits in property which he owned in fee.

It is clear that paragraph 7 of section 249-r of the New York Tax Law* requires the inclusion of the appointed fund in decedent's gross estate. The precise point at issue is whether the statute is invalid because the power had been created by a nonresident donor.

SECOND.

A state statute imposing an estate tax with respect to property passing under the exercise by a resident decedent of a power of appointment is not violative of the due process clause of the Federal Constitution, even though the power had been created by a nonresident.

Petitioner submits that the power of New York to tax is no more restricted by the Fourteenth Amendment than

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* Section 249-r of the Tax Law of New York, so far as relevant, provides:

"§ 249-r. Gross estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *;

* * * * *

"7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will * * *."

its power to impose a death tax on intangible personal property owned by a domiciliary decedent but located elsewhere. Decisions of this Court have established the broad power of the state of domicile to impose death taxes on such intangibles. The state of domicile has power to tax the transfer at death of: a bank account in another state (*Baldwin v. Missouri*, 281 U. S 586); intangibles in a safe deposit box in another state (*Blodgett v. Silberman*, 277 U. S. 1); bonds of foreign municipalities (*Farmers' Loan & Trust Company v. Minnesota*, 280 U. S. 204); stock of a foreign corporation (*First National Bank of Boston v. Maine*, 284 U. S 312); indebtedness and unpaid dividends owing a decedent by a corporation controlled by him and doing business in another state (*Beidler v. South Carolina Tax Commission*, 282 U. S. 1); an interest in a partnership engaged in business in another state (*Blodgett v. Silberman, supra*); the relinquishment at death of a power of revocation over a trust held in another state (*Graves v. Elliott*, 307 U. S 383); the exercise by a decedent of a general power of appointment created by him over property held in another state (*Curry v. McCanless*, 307 U. S. 357).

The interest of the decedent in the case at bar cannot be distinguished from those of the decedents in the above cited cases. Decedent possessed the same power of testamentary disposition as if the intangible personal property in the trust fund was in a safe deposit box in another state or if he had created the trust over which he had the power of appointment.

The conclusion of the courts below that, under the due process clause of the Federal Constitution, New York has no jurisdiction to impose a tax with respect to the exercise of the power of appointment by a resident decedent,

because the donor of the power had been a nonresident ignores the principle that the transfer at death of intangible personal property is subject to tax at the domicile of the person who has the power of disposition.

Bullen v. Wisconsin, 240 U. S. 625;
Curry v. McCanless, supra, 307 U. S. 357;
Graves v. Elliott, supra, 307 U. S. 383;
Pearson v. McGraw, 308 U. S. 313.

In *Bullen v. Wisconsin, supra*, the inheritance tax of Wisconsin on property held in trust in Illinois was upheld where the decedent had power to control the disposition of the trust fund. This Court said (p. 631):

> "What we do say is that the Supreme Court of Wisconsin was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute, that there is no constitutional objection to its doing so, and that although Illinois also has taxed the fund, as it might, we are not aware that it has attempted to qualify the effect that Wisconsin has given to the power, and do not intimate that it could have done so, if it had tried. * * *"

In *Curry v. McCanless, supra*, Tennessee asserted a tax on the testamentary exercise by a resident decedent of a power of appointment over intangible personal property held in trust in Alabama. In holding that such a tax was not a violation of due process of law, this Court said (pp. 366-7):

> "The power of government over them [intangibles] and the protection which it gives them cannot be exerted through control of a physical thing. They can be made effective only through control over and protection afforded to those persons whose relationships are the origin of the rights. * * * Obviously, as sources of actual or potential wealth—which is an appropriate measure of any tax imposed on ownership or its exer-

cise—they cannot be dissociated from the persons from whose relationships they are derived.

"* * * From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state, or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. * * *"

Again, the Court said (p. 372):

"So far as the power of Tennessee to tax the exercise of the power of appointment is concerned, there is no substantial difference between the present case and any other case in which at the moment of death the evidences of intangibles passing under the will of a decedent domiciled in one state are physically present in another."

In *Graves v. Elliott, supra,* 307 U. S. 383, in upholding the power of New York to tax the relinquishment of a power of revocation at death, this Court said (pp. 386-7):

"For reasons stated in our opinion in *Curry v. McCanless, supra,* we cannot say that the legal interest of decedent in the intangibles held in trust in Colorado was so dissociated from her person as to be beyond the taxing jurisdiction of the state of her domicile more than her other rights in intangibles. Her right to revoke the trust and to demand the transmission to her of the intangibles by the trustee and the delivery to her of their physical evidences was a potential source of wealth, having the attributes of property. As in the case of any other intangibles which she possessed, control over her person and estate at the place of her domicile and her duty to contribute to the

support of government there afford adequate constitutional basis for imposition of a tax measured by the value of the intangibles transmitted or relinquished by her at death."

In *Pearson v. McGraw, supra,* 308 U. S. 313, this Court upheld the right of Oregon to impose a tax on a transfer by a resident, of property held in Illinois, saying (p. 318):

"Accordingly, the transfer was taxable on the authority of *Curry v. McCanless, supra,* and related cases. For constitutionally the property was 'within the jurisdiction of the state' of Oregon since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner."

The principle enunciated in the foregoing cases was similarly expressed in *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, where this Court said (pp. 444-5):

"Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the

state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. See *Continental Assurance Co. v. Tennessee, supra.* See also *Equitable Life Society v. Pennsylvania,* 238 U. S. 143; *Maxwell v. Bugbee,* 250 U. S 525; *Compania de Tabacos v. Collector,* 275 U. S. 87, 98; *New York ex rel. Cohn v. Graves,* 300 U. S. 308; *Atlantic & Pacific Tea Co. v. Grosjean,* 301 U. S. 412; *Atlantic Refining Co. v. Virginia,* 302 U. S. 22; *Curry v. McCanless,* 307 U. S. 357. * * *"

Petitioners submit that New York has jurisdiction to tax in the case at bar. The decedent, having been domiciled there at the time of his death and having possessed and exercised the power of testamentary disposition there, was subject to the control of that State, and, hence, was under a duty to contribute to the support of the government of New York. New York, therefore, is justified in measuring the estate tax imposed in decedent's estate by the sum total of the property shifting at decedent's death, including the intangible personal property which passed to his beneficiaries under the exercise of the power of appointment.

In *Stewart v. Pennsylvania,* 312 U. S. 649, this Court upheld the power of Pennsylvania to tax the beneficial interest of a life tenant in a trust created by a nonresident and held and administered outside the taxing state. The life tenant's beneficial interest there was in Pennsylvania, as the decedent's power of disposition here was in New York.

In an attempt to avoid the necessary conclusion from the foregoing, respondents concede that, while the domicile

of the donee of the power of appointment can tax where the donee was also the donor, yet where the donee and the donor are different they insist that the donee's domicile lacks jurisdiction to tax.

Respondents' distinction is invalid. The operative fact is control over the person who possesses the power of testamentary disposition, regardless of the source of power.

The fact that the donee of the power in the *Curry* case was also the donor does not distinguish such case from the case at bar. In the *Curry* case the decedent having irrevocably conveyed property in trust she had at death only the right of testamentary disposition of such power, and it was the exercise of that right which Tennessee taxed. "Exercise of that power * * * was made a taxable event by the statutes" of Tennessee. This Court upheld the Tennessee tax because the right of the decedent to dispose of the trust property—the only attribute of ownership of such property that she possessed at death—adhered to her person at her domicile in Tennessee. But this right would have been the same if the power of disposition had been created by some one else. It cannot be that Tennessee would be without power to tax if decedent's father had created a trust in Alabama giving the decedent the power of appointment, but can tax if instead he gave the property to the decedent, who, in turn, created a trust there but reserving a power of appointment.

Petitioners concede there is a slight difference between a power created by the donee himself and one created by another in that, in the former case, the donee can during his lifetime appoint to creditors and, in the latter, the donee, although he can in fact appoint to his creditors, cannot contract to do so. However, this difference is unimportant.

It cannot be that jurisdiction to tax depends on such a negligible factor any more than it did in *Whitney v. State Tax Commission, supra*, 309 U. S. 530. There this Court upheld the estate tax imposed by New York on the exercise of a limited power of appointment. In so doing it overruled the contention that no tax was impossible because the donee of a limited power could not benefit himself, saying (pp. 538-9):

> "In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall."

Again, respondents concede that while the domicile of a donee of a power of appointment, exercisable by deed or by will, can tax regardless of the source of the power, yet they insist that the donee's domicile lacks jurisdiction where the power is only exercisable by will because the donee cannot benefit himself during life. The invalidity of respondents' distinction has been pointed out in *Whitney v. State Tax Commission, supra*, where this Court upheld the power of a state to consider a power of appointment that could not be utilized to benefit the donee as equivalent to ownership for purposes of taxation. Furthermore, this contention ignores the fact that the estate tax imposed by New York is measured by the amount of property over which a decedent has the power of testamentary disposition. It is not measured merely by the extent of decedent's rights during his life in such property. There is validly

taxed the face value of life insurance and not merely the surrender value which the decedent had during his lifetime. There is validly taxed the full value of property passing under the exercise of a limited power under which the decedent cannot benefit himself and where the power of testamentary disposition is narrowly restricted. There is validly taxed the full value of property, even though owned by decedent as a tenant by the entirety or as a joint tenant. In theory and in fact, the full value of property is included because, in so far as the power to distribute property to a decedent's beneficiaries is concerned, an individual who owns two million dollars outright has no more to transmit to his beneficiaries at his death than has an individual who owns only one million dollars outright but has a testamentary power of appointment over another million dollars.

Respondents have asserted that the minority opinion of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis and Mr. Justice Stone, in *Wachovia Bank & Trust v. Doughton, supra,* 272 U. S. 567, was based on the erroneous view that the donee of a testamentary power of appointment could contract to execute the power and, hence, benefit himself. Nothing in that opinion indicates that these judges would have concurred with the majority, even if they had believed that the donee could not contract to execute the power. Time has not resolved the difficulty, expressed in the minority opinion; of reconciling the *Wachovia* decision with *Bullen's* case. Furthermore, the subsequent dissenting or minority opinions in *Farmers' Loan & Trust Company v. Minnesota, supra,* 280 U. S. 204; *Baldwin v. Missouri, supra,* 281 U. S. 586; *Beidler v. South Carolina Tax Commission, supra,* 282 U. S. 1; *First National Bank of Boston v. Maine, supra,* 284 U. S. 312; indicate a far broader basis for the disagreement of the min-

ority. In any event, the *Wachovia* case was decided when it was believed that the Fourteenth Amendment prohibits more than one tax on the transfer of property at death. The decisions in *Curry v. McCanless, supra,* and *Graves v. Elliott, supra,* have demonstrated that premise to be erroneous. (See 53 Harvard Law Review 1013.)

Respondents assert that no "privilege" was conferred by New York in the case at bar and, hence, New York is without jurisdiction to tax. This Court, in its decision in the *Curry* case, did not justify the right of Tennessee to tax on any privilege of transmission conferred by that State. The Tennessee tax was justified by reason of the benefits conferred upon the decedent and her obligation to contribute to her state of domicile. The proposition sought to be achieved by respondents, that the granting of the privilege of transmission is necessary for a state to impose a tax measured by such property, is not valid.

Neither the distinctions respondents seek to make, nor the limitations they would read into *Curry v. McCanless, supra,* and *Graves v. Elliott, supra,* add to a logical pattern of taxation.

THIRD.

A state statute imposing an estate tax with respect to property passing under the exercise by a resident decedent of a power of appointment is not violative of the due process clause of the Federal Constitution, even though the power had been created by a nonresident, where the property is within the jurisdiction of such state.

A state's jurisdiction to tax extends to all property within its borders. In respect to real and tangible personal

property, a state has exclusive jurisdiction to impose taxes on the transfer thereof at death. The situation is somewhat different in respect to death taxation on the transfer of intangible personal property. It may be that intangibles are subject to such taxation ordinarily only at the domicile of the person who has the power of testamentary disposition over them.

First National Bank of Boston v. Maine, supra, 284 U. S. 312;

Beidler v. South Carolina Tax Commission, supra, 282 U. S. 1;

Baldwin v. Missouri, supra, 281 U. S. 586;

Farmers' Loan & Trust Company v. Minnesota, supra, 280 U. S. 204.

However, it is clear that when intangibles are brought within the protection of the laws of another state such other state is not deprived of its jurisdiction to tax by anything found in the Fourteenth Amendment.

Curry v. McCanless, supra, 307 U. S. 357;

Cf., Graves v. Elliott, supra, 307 U. S. 383;

Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83;

New Orleans v. Stempel, 175 U. S. 309;

Bristol v. Washington County, 177 U. S. 133;

Liverpool & L. & G. Ins. Co. v. Board of Assessors, 221 U. S. 346;

New York ex rel. Whitney v. Graves, 299 U. S. 366.

In the case at bar, the decedent determined that it was to his advantage to manage his share of the trust fund as a separate trust. This was done with the knowledge and consent of the other trustees. The decedent also found it

advantageous to change his domicile from Massachusetts to New York, and, in so doing, he brought with him his share of the trust fund to New York where it was given the protection and benefit of the laws of New York. He had the property in New York for almost fifteen years, and it had not been in Massachusetts for almost twenty years prior to his death. Decedent could sue or be sued as trustee in the courts of New York. It cannot be questioned that, if New York imposed a personal property tax, it could have assessed the tax on this property which was managed, controlled and administered in New York. Petitioners, therefore, submit that the trust property was within New York's taxing power, and that the tax imposed on the transfer thereof at decedent's death does not conflict with the Fourteenth Amendment.

In *Curry v. McCanless, supra*, this Court upheld not only the right of the domicile of the donee of the power to impose a death tax on its exercise (Tennessee), but it also upheld the right of the domicile of the trustee of the appointive fund to impose such a tax (Alabama). In so doing, this Court said (p. 370):

> "If taxation is but a means of distributing the cost of government among those who are subject to its control and who enjoy the protection of its laws, see *New York ex rel. Cohn v. Graves, supra*, 313; *First Bank Stock Corp. v. Minnesota, supra*, 241, legal ownership of the intangibles in Alabama by the Alabama trustee would seem to afford adequate basis for imposing on it a tax measured by their value. We can find no more ground for saying that the Fourteenth Amendment relieves it, or the property which it holds and administers in Alabama, from bearing that burden, than for saying that they are constitutionally immune from paying any other expense which normally attaches to the administration of a trust in that state. This Court has never denied the constitutional power

of the trustee's domicile to subject them to property taxation. *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83; see cases collected in 30 Columbia Law Rev. 530; 2 Cooley, Taxation (8th ed.), §602. And since Alabama may lawfully tax the property in the trustee's hands, we perceive no ground for saying that the Fourteenth Amendment forbids the state to tax the transfer of it or an interest in it to another merely because the transfer was effected by decedent's testamentary act in another state."

Petitioners submit that this case is governed by *Curry v. McCanless, supra*, and it is no distinction to say that in that case the decedent was both donee and donor of the power. Alabama's right to tax was upheld, although it had no jurisdiction over the decedent, either as donor or as donee, but simply because the property was in the hands of a trustee resident there.

It is also of no moment, as respondents have suggested, that in the *Curry* case the appointive fund had been held in Alabama during all of the trust term, but in the case at bar the appointive fund, although here at the time of the exercise, was out of the State during several of the years of the trust term. Certainly the decision in the *Curry* case would have been the same if the decedent there had originally named Georgia trustees and shortly before her death removed them and substituted the Alabama trustees. The only important fact, from the view of jurisdiction to tax, is the place where the property is managed and controlled at the time of the transfer.

Respondents have urged that it has never been decided whether the New York one-third of the property passed under the exercise of one-third of the entire residuary estate so passed. Petitioners submit, under this point, that

it is clear that the New York one-third passed under the exercise, but, even if respondents' contention be granted, it only leads to the conclusion that, since one-third of the entire residuary estate was held and administered in New York, then at least one-ninth of the property is taxable because of the fact that it was located in New York.

Respondents have contended that New York is without power to tax because the devolution of the appointive property is governed by the laws of the domicile of the donor. This statement is inaccurate, for it is the law of the state having control of the property which governs its devolution, although as an almost universally accepted rule, such state, for reasons of comity, applies the law of the donor's domicile (*Bullen v. Wisconsin, supra; Frick v. Pennsylvania*, 268 U. S. 473; *cf. Riley v. New York Trust Company*, United States Supreme Court, February 16, 1942).

Conclusion.

For the reasons above stated, it is submitted that the order of the Surrogates' Court of New York County was in error in excluding from decedent's gross estate the value of the intangible personal property passing under the power of appointment exercised by decedent.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 604

MARK GRAVES, JOHN P. HENNESSEY and JOSEPH M. MESNIG, as Commissioners Constituting the State Tax Commission of the State of New York,

Petitioners,

vs.

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors of the Last Will and Testament of Eugene V. R. Thayer, Deceased,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI. BRIEF AND ARGUMENT IN OPPOSITION THERETO.

HARRISON TWEED,
Attorney for Respondents.

WILLARD A. MITCHELL,
THOMAS A. RYAN,
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The Question Presented.

Although the petitioners have so phrased their petition as to make it appear that they are presenting a single question under the Federal Constitution, they have in fact asked that this Court consider two such questions, only the first of which is justified by the record.

The "question presented" by the petition comprises the following two distinct questions:

A. Whether the Fourteenth Amendment (as already decided by this Court unequivocally in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567) prohibits a State from imposing an Estate Tax with respect to intangible personal property passing under

the testamentary exercise by a resident decedent of a general testamentary power of appointment, where the power had been created by the Will of a non-resident.

B. Whether, if the Fourteenth Amendment otherwise prohibits a State from imposing the tax, it also prohibits such taxation when the appointive property has a taxable *situs* within the taxing State. This question is not justified by the record (Point Two, *infra*).

Statement of Facts.

The petition fails to make clear the fact that the power exercised by the decedent was not a general power of appointment, but a general *testamentary* power of appointment (R. 104-105). The distinction is of the utmost significance.

The petitioners' statement of facts is otherwise substantially correct. The essential facts are these:

The decedent, a New York resident, exercised a general testamentary power of appointment created by the Will of his father, a Massachusetts resident. He was one of three trustees of his father's residuary estate and was a life beneficiary of and had a testamentary power of appointment over a one-third share of the trust. At his death there was physically present in New York certain intangible property belonging to the trust estate, but it has never been established that this particular property was the property over which his power of appointment operated (R. 53-57).

The New York Courts have unanimously ruled in this case that New York is without power to tax the property as part of the decedent's estate. The Court of Appeals in a *per curiam* opinion stated that a question under the Federal Constitution was presented and necessarily passed upon, but did not state specifically what the Federal question was, beyond stating that Section 249-r, subdivision 7 of the Tax Law of the State of New York, as sought to be applied in this proceeding, is repugnant to the Fourteenth Amendment.

Summary of Argument.

I. The question presented herein was decided in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567 (1926). That decision has never been expressly or impliedly overruled.

II. The question of the effect of the presence in New York of certain securities which may have been the subject of the power of appointment is not properly before this Court.

III. For this Court to consider the case at hand will serve no public interest.

POINT ONE

This question has been definitely decided by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567 and that decision has never been expressly or impliedly overruled.

The question decided herein by the New York Court of Appeals has been directly decided by this Court, and the decision of the Court of Appeals in no way conflicts with any decision of this Court.

Wachovia Bank & Trust Co. vs. *Doughton*, 272 U. S. 567 (1926) is directly in point. A North Carolina resident (Mrs. Taylor) exercised a testamentary power of appointment created by the Will of a Massachusetts resident. In holding that North Carolina could not tax the property passing under the power, this Court said (p. 575):

> "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things

wholly beyond her jurisdiction or control. *Frick* v. *Pennsylvania*, 268 U. S. 473."

Mr. Justice HOLMES wrote a separate opinion based upon a misconception of a very significant legal principle. This opinion was not a dissent. It simply outlined the case of *Bullen* vs. *Wisconsin*, 240 U. S. 625 (1916), which had held that the State of domicile of the settlor of a trust who reserved the power of revocation and a general power of appointment *by deed as well as by will*, might tax the property as part of his estate. Mr. Justice HOLMES stated that, in his mind, the power of appointment in the *Wachovia Bank* case was as much a source of wealth to the donee as the power of appointment was to Bullen. He based this view upon his incorrect belief that "Mrs. Taylor, the donee, had * * * the power to dispose of the remainder by a will which she could bind herself to make." He then said that he could not help doubting that the *Wachovia Bank* decision could be reconciled with the *Bullen* case. This was not designated a dissent; it simply stated that Mr. Justice BRANDEIS and Mr. Justice STONE concurred "in this view." The basis of that view was the mistaken belief that the power could be validly contracted away and thereby operate as a source of wealth to the donee.

It is well established, however, both in New York and in Massachusetts, that a contract to exercise a *testamentary* power of appointment in a particular way is invalid. *Farmers' Loan & Trust Co.* vs. *Mortimer*, 219 N. Y. 290 (1916); *Vinton* vs. *Pratt*, 228 Mass. 468, 117 N. E. 919 (1917); Gray, The Rule Against Perpetuities (Third Edition), § 526c.

The power in the *Bullen* case was a general power of appointment *by deed or by will*. Even where given by a third person, such a power of appointment is in many respects the equivalent of ownership. Gray, The Rule Against Perpetuities (Third Edition), § 524. It is essentially no different from a power of revocation retained by a donor of property. In the case of a mere *testamentary*

power of appointment given by a third person, however, the donee of the power has no interest in the principal of the property greater than that of any life beneficiary. In the words of Mr. Justice CARDOZO in *Farmers' Loan & Trust Co.* vs. *Mortimer, supra*, at page 295:

> "the subject-matter of the power is not the property of the promisor. It is the property of his mother. The promisor was not the owner of any legal estate. He was the beneficiary of a trust. In such circumstances a power of appointment does not involve that absolute power of disposition which is equivalent to a fee (*Farmers' L. & T. Co.* v. *Kip*, 192 N. Y. 266). Those who take under this power have received nothing that was the property of John Mortimer [the donee]."

See also *Helvering* vs. *Safe Deposit & Trust Co.*, 121 F. (2d) 307 (C. C. A. 4th Circ., 1941); *United States* vs. *Field*, 255 U. S. 257 (1921).

In the *Bullen* case, moreover, the donor and donee of the power were one and the same. The transfer reserving the power was therefore not complete *from him* until his death and could be taxed as a transfer by him *of his own property* which did not take effect until his death.

Accordingly, it is clear that the separate opinion in the *Wachovia Bank* case was not thoroughly considered, as indicated by the fact that it was not labelled as a dissenting opinion.

The *Wachovia Bank* case has never been expressly overruled. It has been consistently recognized as an established precedent.* It was recognized as such as recently as by MR. JUSTICE STONE in *Curry* vs. *McCanless* (307 U. S. 357, at page 371).

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* *E. g., Brooke* vs. *City of Norfolk*, 277 U. S. 27, 29 (1928); *Safe Deposit & Trust Co.* vs. *Virginia*, 280 U. S. 83, 93 (1929); *Matter of Sandford*, 277 N. Y. 323, 329 (1938); *McMurtry* vs. *State*, 111 Conn. 594, 601, 151 Atl. 252, 256 (1930); *Commonwealth* vs. *Huntington*, 148 Va. 97, 121; 138 S. E. 650, 658 (1927); *Helvering* vs. *Safe Deposit & Trust Co.*, 121 F. (2d) 307, 309 (C. C. A. 4th Circ., 1941).

It is the assertion of the petitioner, however, that the recent decisions in *Curry* vs. *McCanless* and *Graves* vs. *Elliott*, 307 U. S. 383 (1939) are inconsistent with the *Wachovia Bank* decision and that the latter has been virtually overruled. Support for the petitioner's argument is to be found only in casual references in certain Law Review articles. The only serious consideration of the argument has been given by the Courts of New York in the case at hand. They have unanimously held that the *Wachovia Bank* case has not been overruled.

It cannot be said that their decision is "probably not in accord with applicable decisions of this Court" within the meaning of Rule 38, subdivision 5(a), of this Court. It in no way conflicts with the decisions of this Court for the following reasons:

Curry vs. McCanless, 307 U. S. 357 (1939).

In the *Curry* case a Tennessee resident deliberately created in Alabama a trust of her own intangible property, reserving the income for life and the power to appoint the property by will. This was a transfer to take effect at death. It was her own property and she did not make a completed gift of it. Cf. *Rasquin* vs. *Humphreys*, 308 U. S. 54 (1939). There were a number of reasons why Tennessee could tax this property, none of which exist in the case at hand:

(1) The transfer was *from* a Tennessee resident of *her own* intangible property which was not completed except at and by reason of her death. *Bullen* vs. *Wisconsin*, 240 U. S. 625 (1916); *Keeney* vs. *New York*, 222 U. S. 525 (1912); *Guaranty Trust Co.* vs. *Blodgett*, 287 U. S. 509 (1933).

(2) The decedent, being donor and donee of the power, could contract to exercise it and could thereby realize upon the principal which she had placed in trust. See *Citizens National Bank* vs. *Watkins*, 126 Tenn. 453, 150 S. W. 96 (1912); *J. S. Menken Co.* vs. *Brinkley*, 94 Tenn. 721, 31 S. W. 92 (1895). The contrary is true of a testamentary power of appointment created by a third person. *Farmers' Loan and Trust*.

Company vs. *Mortimer, supra* (219 N. Y. 290); *Vinton* vs. *Pratt, supra* (228 Mass. 468, 117 N. E. 919); Gray, The Rule Against Perpetuities (Third Edition), Section 526-c.

(3) In the *Curry* case, the decedent voluntarily subjected the transfer of *her own property* to the laws of two states.

Graves vs. Elliott, 307 U. S. 383 (1939).

In the *Graves* case, a Colorado resident created a trust in Colorado, reserving the power to revoke and to change the beneficiaries. She subsequently died a resident of New York without having relinquished her power of revocation. Obviously, the transfer was incomplete from her until her death. The power of revocation was also a source of wealth to the settlor. She could at any time have exercised it and realized thereby upon the principal of the fund; therefore her domicile could tax the property. *Keeney* vs. *New York, supra* (222 U. S. 525); *Bullen* vs. *Wisconsin, supra* (240 U. S. 625).

The Case at Hand.

In the case at hand, a Massachusetts resident by will created a trust in Massachusetts with three Massachusetts residents as trustees. He gave the decedent herein only the right to income for life (which the State of his domicile could tax during his lifetime) and the power of appointment by will (which the State whose laws controlled its exercise — Massachusetts — could tax). The trust was given its situs in Massachusetts. The decedent's father did not, as he might have done, create a trust with a New York trust company as trustee and thereby subject his property to the laws of two states. He made Massachusetts law alone applicable to the completion of the transfer. The property was subject to the control of the Massachusetts Court and remained so until the transfer from the Massachusetts trustees was completed by the exercise of the power. *Matter of Sandford*, 277 N. Y. 323, 328

(1938). The property passed at the death of the decedent herein from a Massachusetts resident through Massachusetts trustees to an appointee whose title depended upon Massachusetts law. The transfer was *by* the decedent but in no sense *from* him. He gave up nothing that was ever his. He had no estate in the principal of the trust. He had a single power with respect to it, to appoint it by will. Only if New York conferred the privilege of exercising the power would it have any justification to tax. Unlike the case of the owner of property, however, the transfer by Thayer was subject not to the law of his domicile but to the law of Massachusetts. *Blount* vs. *Walker*, 134 U. S. 607 (1890); *Sewall* vs. *Wilmer*, 132 Mass. 131 (1882); *Hogarth-Swann* vs. *Weed*, 274 Mass. 125, 174 N. E. 314 (1931); *Matter of New York Life Insurance & Trust Co.*, 209 N. Y. 585 (1913).

Not only has the *Wachovia Bank* case never been overruled, directly or indirectly, but the *Curry* and *Graves* cases established no principle of law not firmly established before the *Wachovia Bank* case was decided, viz.:

(a) The right of the State of domicile of the donee of a power of appointment created by himself had been established in *Bullen* vs. *Wisconsin*, a unanimous decision,

(b) The right of the State of domicile of the settlor of a trust who reserved the right to revoke had been established in *Keeney* vs. *New York*, also a unanimous decision.

(c) Where the donor and the donee were different persons but were domiciled in the same State, the State could tax the exercise of the power, on the theory that the State controlled and conferred the privilege of executing a will in the form necessary to exercise the power effectively. *Chanler* vs. *Kelsey*, 205 U. S. 466 (1907), *Orr* vs. *Gilman*, 183 U. S. 278 (1902). These cases were distinguished in the *Wachovia Bank* case, and the distinction appears to have been recognized as controlling by the entire Court. No mention

of these cases was made in the separate opinion of Mr. Justice Holmes therein.

Aside from the decisions in *Curry* vs. *McCanless* and *Graves* vs. *Elliott*, the State Tax Commission cites *Pearson* vs. *McGraw*, 308 U. S. 313 (1939) and *Van Dyke et al.* vs. *Wisconsin Tax Commission et al.*, 311 U. S. 605 (1940). Neither of these cases is of any significance in this matter. They simply uphold the well-established right of a State of domicile to tax the *owner* of intangible property (or an owner who has relinquished certain rights to his own property and retained others or has made a transfer in contemplation of death) from levying a tax on that property as part of the decedent's estate, or from levying a gift tax upon a resident's transfer of *his own property*.

There is, therefore, no conflict between the decision of the New York Courts herein and any decision of this Court.

POINT TWO

The question of the effect of the presence in New York of certain securities is not properly before this Court.

The only question before this Court is whether the fact that a donee of a general testamentary power of appointment is domiciled within a State gives that State the power to impose a tax upon the property transferred by his exercise of that power.

The petitioners seek by indirection to obtain consideration of the additional question of whether the fact that the appointive property was present in the State would give that State the power to impose a tax upon its transfer.

The latter question is not before this Court for a number of reasons:

(1) The Court of Appeals did not necessarily decide that the Federal Constitution prohibits a State from levying

an Estate Tax upon property having its situs within that State.

The petitioners, in the Surrogate's Court, the Appellate Division and the Court of Appeals, argued that the presence in New York of certain securities which they alleged were the appointive property differentiated this case from the *Wachovia Bank* case and justified the imposition of the tax by New York. The Executors argued in answer thereto (a) that the statute in question was not intended to tax securities by reason of their presence within the State, and in fact could not do so under the State Constitution; (b) that the presence of the appointive property in New York had not been established; and (c) that its presence in New York, even if proved, did not constitute a taxable situs under New York law. The New York Courts refused to lend any significance to the presence of certain securities in New York. Their decision in this respect could have been based, and almost unquestionably was based, upon any one or more of the above arguments of the Executors, namely:

(a) The State Constitution, Article XVI, Section 3, specifically waives the power of the State to tax intangible property on the basis of its presence or a trustee's domicile within the State. See Appendix A.

(b) Even if the appointive property was in New York, it did not have a tax situs in the State under New York law. A trust may have but one situs and the removal of a trustee, with or without the property, cannot affect its situs. *Matter of Sandford*, 277 N. Y. 323 (1938); 2 Beale, Conflict of Laws, section 297.1, page 1024; *Swetland* vs. *Swetland*, 105 N. J. Eq. 608, 149 Atl. 50, 52 (1930). Under New York law, the property had no recognizable situs in New York. Constitution of the State of New York, Article XVI, Section 3 (Appendix A hereto); *Matter of Sandford, supra.*

(c) The presence in New York of the appointive property had not been established. It has never been determined whether the decedent's power of appoint-

ment operated to pass title to the securities which he segregated or simply to one-third of the entire residuary trust. This question was raised in the Probate Court in Massachusetts, but was settled by compromise (R. 53-57).

(2) Moreover, the Court of Appeals not only did not have to decide but clearly did not decide that the Fourteenth Amendment prohibits a State in which property has its situs from imposing a tax upon its transfer. The Court had before it the unequivocal decisions of this Court to contrary effect in *Graves* vs. *Elliott*, 307 U. S. 383 (1939); *Curry* vs. *McCanless*, 307 U. S. 357 (1939); *Safe Deposit & Trust Co.* vs. *Virginia*, 280 U. S. 83 (1929). The Court had itself, in *Matter of Brown*, 274 N. Y. 10 (1937), upheld the right of Colorado, where a New York resident had established an *inter vivos* trust with a Colorado trust company, to tax the transfer of that property upon the settlor's death. The Court of Appeals nevertheless considered the presence of the securities to be of no significance herein and based its decision upon the *Wachovia Bank* case, in which the appointive property was definitely located outside of the taxing State. This is apparent from the indistinguishable case of *Matter of Sandford*, *supra* (277 N. Y. 323), the material part of which is quoted hereinafter as Appendix B, and which was decided after *Matter of Brown*. That the *Wachovia Bank* case was deemed to be controlling —and the location of the securities to be of no significance— is also apparent from the opinion of the Surrogate's Court herein (R. 192-202). The Appellate Division and Court of Appeals affirmed the Surrogate without opinion.

Under the circumstances, the only question, if any, which may properly be considered by this Court is whether a State, by reason of being the domicile of a donee of a testamentary power of appointment, may, under the Federal Constitution, include in the estate of the donee the property subject to the power if the power was created by the will of a resident of another State. The physical situs of the appointive property is of no significance.

POINT THREE

For this Court to consider this case will serve no public interest.

There is no reason why this Court should in its discretion grant the writ of certiorari sought herein:

A. There is no justifiable confusion as to the powers of the States to tax the transfer of property by general testamentary power of appointment:

(1) The State whose laws confer and control the right of exercising the power of appointment may tax the exercise thereof. *Chanler* vs. *Kelsey*, 205 U. S. 466 (1907); *Orr* vs. *Gilman*, 183 U. S. 278 (1902); *Gardiner* vs. *Burrill*, 225 Mass. 355, 114 N. E. 617 (1916). See also *Wachovia Bank & Trust Co.* vs. *Doughton*, *supra*, at pages 573-575.

(2) The State of domicile of the donee of a general testamentary power of appointment created by a third person may not tax the appointive property unless its laws control or confer the right to exercise that power. *Wachovia Bank & Trust Co.* vs. *Doughton*, *supra*. Cf. *United States* vs. *Field*, *supra* (255 U. S. 257).

(3) The State of domicile of the donee may levy an estate tax upon the appointive property where the donor and donee are the same person (*i. e.*, transfer taking effect at death). *Bullen* vs. *Wisconsin*, *supra* (240 U. S. 625); *Curry* vs. *McCanless*, *supra*; see also *Guaranty Trust Co.* vs. *Blodgett*, *supra* (287 U. S. 509); *Keeney* vs. *New York*, *supra* (222 U. S. 525).

(4) The State of domicile of the donee of a general power of appointment *by deed or by will* may levy an estate tax upon the appointive property regardless of who created the power. *Bullen* vs. *Wisconsin*, *supra*.

The foregoing principles define clearly and completely the powers of the States to tax property passing under a power of appointment. There is no need for reconsideration or amplification of these principles.

B. Not only is there no confusion or uncertainty justifying further consideration of this case but there is no public interest to be served thereby.

(1) The established principles do not facilitate the evasion of taxation. The donee of a general testamentary power of appointment may be taxed for exercising that power by the State whose laws control its exercise. There is no reason why any other State should be entitled to levy a tax upon it. The donee's domiciliary State affords him no rights or privileges with respect to the appointive property.* The transfer of title upon his death (unlike that of an owner of property) depends not upon the laws of his domicile but solely upon the laws of the donor's domicile. The donee's domiciliary State can neither control nor prevent the effective exercise of the power.

(2) To alter the established principles would do great injustice.

The *owner* of intangible personal property may move himself and his property as he will from State to State and yet can be taxed upon his death only by the State of his domicile, unless he has voluntarily given the property a physical situs in another State, in which case the same property may be taxed by two States upon his death.

The donee of a general testamentary power of appointment has far fewer rights in the property than he would were he its owner. Yet to uphold the petitioners' claims would mean that the donee could very

* The right to receive the income may, of course, be taxed by the beneficiary's domiciliary State; this, however, does not justify a tax by the domiciliary State upon the principal of the trust. *Brooke* vs. *City of Norfolk, supra* (277 U. S. 27).

easily be taxed at death by as many as three States *without having it in his power to prevent any of the multiple taxation.* He could be taxed (a) by the State of the donor's residence, whose laws control the exercise of the power, (b) by the State of his own domicile and (c) by the State into which the trustee might choose to take the property.

Such manifest injustice reveals the fallacies in the petitioners' contentions.

C. It is submitted that the principles established by this Court and which are outlined above, constitute a reliable guide for the conduct of taxing authorities and persons desiring to create or exercise powers of appointment. There is no justifiable confusion in the law.

Conclusion.

The petition for a writ of certiorari to the Surrogate's Court of the County and State of New York should be denied.

Respectfully submitted,

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Attorney for Respondents.

WILLARD A. MITCHELL,
THOMAS A. RYAN,
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APPENDIX A.

Article 16, § 3 of the Constitution of the State of New York.

"Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

APPENDIX B.

Excerpt from the Opinion in *Matter of Sandford*, 277 N. Y., 323 (1938), pages 328-329.

"O'Brien, J. The testatrix, Lisa W. Sandford, who died February 7, 1934, was the daughter of Thomas B. Winchester, a resident of Massachusetts, whose will was probated in that Commonwealth in March, 1904. By his will Mr. Winchester established a trust in favor of this testatrix, among others, with power of appointment by her in her will of the beneficiary of the principal. By the seventh paragraph of Mrs. Sandford's will, executed June 30, 1932, and the codicil, executed September 1, 1933, she exercised this power in favor of ten individuals and one charitable institution.

"The first issue presented by appellant, State Tax Commission, is whether the value of the securities in the Winchester trust should be included in the gross estate of Lisa W. Sandford and whether the transfer, by the exercise of her power of appointment, is taxable in this State. The record discloses the fact that the original trustees of the testamentary Winchester trust were both residents of Massachusetts, and that after the death of one of them the other continued to act as sole surviving trustee until his death in January, 1933. During all that time the securities, comprising the *corpus* of the trust, were held by the trustees in Massachusetts. After the death of the surviving trustee the Probate Court of Suffolk county, Massachusetts, in April, 1933, appointed, as substitute trustees, two residents of New York, who are still acting. For twenty-nine years, until shortly after the appointment of the New York residents as trustees, *all* the securities comprising the trust were held in Massachusetts, but since April or May, 1933, the *greater part* have been held in New York. This testatrix died in February, 1934. The Winchester trust was created by a Massachusetts resident, the trustees are subject to the control of the Probate Court of that State, and all the securities constituting the *corpus* had an actual situs there except for one year prior to the death of the donee of the power and at present have at least a constructive situs there. The trustees' obligation is to account to the Massachusetts court. The actual presence in this State of the certificates or instruments evidencing the intangible property did not afford a basis for taxation. Neither did the removal of the residence of the trustee into this State afford a basis for the imposition of a tax. The transfer of the securities in the trust by the exercise of this power of appointment is not taxable in this State. (*Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567.)"

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BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS.

Statement.

The decedent, Eugene V. R. Thayer, died a resident of New York County on January 1, 1937. His will was admitted to probate and letters testamentary were issued thereunder by the Surrogate's Court of New York County to Carl J. Schmidlapp and Elizabeth E. Gorrie, respondents herein (R. 6). A *pro forma* order entered on the report of an appraiser (R. 5) assessing the tax imposed under Article 10-C of the Tax Law upon the estate of the decedent was made on December 1, 1938 (R. 4). The State Tax Commission appealed to the Surrogate (R. 1) on the ground that the order was erroneous because the report of the appraiser failed to include in the gross estate the value of the property which passed under the exercise of a general testamentary power of appointment conferred upon the decedent by the will of his father, a resident of Massa-

chusetts. On the appeal, the *pro forma* order was affirmed (R. 2), Mr. Surrogate FOLEY writing an opinion which is reported in 172 Misc. 426 (R. 46). The Appellate Division of the Supreme Court, First Judicial Department, unanimously affirmed the Surrogate's decision without opinion (R. 50). The Court of Appeals of the State of New York affirmed the order of the Appellate Division without opinion.

The father of the decedent died a resident of Massachusetts on December 20, 1907, leaving a will which was admitted to probate in Worcester County, Massachusetts (R. 10). His residuary estate he bequeathed in trust, with directions to the trustees to divide the trust fund into as many shares as he might leave children surviving, and to pay to each child the income from one of the shares for life (R. 22). The decedent, Eugene V. R. Thayer, was given the power to appoint a share of the trust by will (R. 22).

The decedent was one of three trustees. For some time the entire trust fund was managed as a unit, but on July 8, 1911, a one-third share of the fund was segregated and was thereafter managed as a separate trust, its value increasing more than the value of the other two shares (R. 10, 13). There were at all times three trustees of all the shares, however (R. 14). All three were originally residents of Massachusetts, and there was never a time when fewer than two of the three trustees have been residents of Massachusetts (R. 14). The decedent never acted nor sought to act as sole trustee of the segregated share (R. 14).

In 1918 the decedent moved to New York and remained here until 1929. As a matter of convenience, but without authorization from the Massachusetts Court (R. 14), he brought the property constituting the segregated share of the trust fund to New York and kept it here in a separate safe deposit box; it was not commingled with his own funds but was at all times kept separate. In 1929 he moved to Illinois and remained there as a resident until 1934, and at that time also he removed the segregated share to Illinois and kept it there until 1934, when he returned to New York

and again brought the securities constituting the segregated share into this state (R. 14).

Annual accounts were separately filed with respect to the said one-third share, after the physical segregation thereof, in the Probate Court of Worcester County, Massachusetts. These annual accounts were rendered by all three trustees and fiduciary income tax returns were also made by all three (R. 35).

The decedent, by his will, exercised in favor of his widow the power given him under his father's will (R. 15).

After the death of the decedent, an account was filed with the Worcester County Probate Court in Massachusetts by the trustees under the will of the decedent's father, and it was then contended on behalf of other parties in interest that the segregation was illegal, and that the decedent's share of the fund was in reality one-third of the total and not the particular securities which he had in his possession as a trustee at the time of his death. The matter was set down for a hearing, but a compromise was agreed upon substantially upon the basis of an equal division of the amount in dispute (R. 10). The effect of the exercise of the power of appointment, therefore, was not to pass title to the entire fund which had been segregated. The validity of the segregation and the question of whether or not the power of appointment was validly exercised over the segregated property rather than over one-third, generally, of the trust fund has never been established.

The Question Presented.

Whether the State of New York has the power to include in the taxable estate of a resident decedent, for the purposes of the New York estate tax, intangible personal property passing under the will of a resident of the State of Massachusetts pursuant to the exercise by a New York resident of a testamentary power of appointment conferred upon him by the will of the Massachusetts decedent.

ARGUMENT.

I. New York may not tax any part of the trust property to which the decedent's power related unless New York conferred or controlled the privilege of transferring it.

If there were no limitations upon the power of a state to tax the transfer of property regardless of whether or not it exercised any control over the transfer, the only question presented in this case would be whether New York had intended by its taxing statutes to levy the tax which the State Tax Commission asserts the right to impose.

However, it is settled beyond dispute that a state may not constitutionally tax property over which it does not exercise any control. The Supreme Court has unanimously held, for example, that a state may not tax real property and tangible personal property situated in another jurisdiction. *Frick* vs. *Pennsylvania*, 268 U. S. 473 (1925). This rule applies with equal force to the taxation of the transfer of property upon the death of its owner or upon the death of a person having certain rights or powers with respect to the property. This limitation upon the powers of the states has been recognized by the Supreme Court in *Curry* vs. *McCanless*, 307 U. S. 357 (1939), at pages 363, 364.

The basis of the rule that a state may not tax real property or tangible personal property outside its borders is that the state in which the property is located has absolute power to control all dealings with it and may grant or deny the power to transfer it. The fact that in the case of tangible personal property the law of the owner's domicile will usually be recognized as controlling its disposition upon the owner's death is not significant, because the recognition of the law of the domicile by the state of situs is a matter of comity which the state need follow only if it wishes to do so. In effect, it merely adopts the law of the domicile as its own with respect to the disposition of the particular property. *Frick* vs. *Pennsylvania, supra* (268 U. S. 473, 491, 494).

Essentially the same principle runs through both the basis for and the limitations upon the power to tax, namely, that the state which seeks to exercise the power must control the transfer which it seeks to tax.

Mr. Justice STONE, concurring in *Farmers Loan & Trust Co.* vs. *Minnesota*, 280 U. S. 204 (1930) at 214, emphasized the fact that a state, in order to sustain a privilege tax, such as an inheritance or succession tax, must exercise control over the transfer. He concurred in the opinion of the majority in that case because, as he said, "the law of Minnesota neither protected, nor could it withhold the power of transfer or prescribe its terms".

This rule was followed by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567 (1926). It was there held that a state is without jurisdiction to tax the appointive property as part of the estate of a resident donee of a testamentary power of appointment where the power was created under the will of a non-resident and the property did not have a physical situs within the state. In that case a North Carolina resident (Mrs. Taylor) exercised a testamentary power of appointment created by the will of a Massachusetts resident. In holding that North Carolina could not tax the property passing under the power, the Court said (p. 576):

> "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control. *Frick* v. *Pennsylvania*, 268 U. S. 473."

II. The State of New York did not confer or control the exercise of the power.

The decedent's privilege of exercising the power of appointment was not conferred by or in any way dependent

upon the laws of New York; it was conferred by and dependent solely upon the laws of Massachusetts. A power of appointment can be effectively exercised only if it conforms with the laws of the donor's domicile, and conversely, the state of the donor's domicile can give effect to the exercise of a power which would not be deemed a sufficient exercise thereof by the state of the donee's residence.

Blount vs. *Walker*, 134 U. S. 607 (1890);

Matter of New York Life Insurance & Trust Co., 209 N. Y. 585 (1913);

Sewall vs. *Wilmer*, 132 Mass. 131 (1882);

Hogarth-Swann vs. *Weed*, 274 Mass. 125, 174 N. E. 314 (1931);

In re Bowditch's Estate, 189 Cal. 377, 208 Pac. 282 (1922).

The property passing under the power of appointment was not owned by the decedent, nor did he have the power to make it his own property or to realize upon it. Accordingly, it did not pass upon his death by virtue of New York law or by reason of a privilege conferred by New York. The privilege was conferred by Massachusetts and Massachusetts could constitutionally tax its exercise. *Gardiner* vs. *Burrill*, 225 Mass. 355, 114 N. E. 617 (1916); *Chanler* vs. *Kelsey*, 205 U. S. 466 (1907); *Whitney* vs. *State Tax Commission* (*Matter of Vanderbilt*), 309 U. S. 530 (1940) at page 538.

In such cases as this the beneficiaries do not receive the property nor does the donee exercise the power by virtue of or under the control of the laws of the state of the donee's residence. *Sewall* vs. *Wilmer, supra.*

In *Blount* vs. *Walker, supra*, it was held by a unanimous court that the courts of the state of a donee's residence had no jurisdiction to declare that the donee's will was duly executed under the laws of the donor's residence or that it was a good execution of the power.

This case is very different from one in which the state of residence of the donee is also the state of residence of the donor of the power of appointment. In such a case, the state of the donee's residence may tax the exercise of the power because its laws conferred the privilege and control the validity of its exercise. *Chanler* vs. *Kelsey, supra; Orr* vs. *Gilman,* 183 U. S. 278 (1902).

The *Wachovia Bank* decision, moreover, indicated (272 U. S. at pp. 574, 575) that the state of the donee's domicile may tax "where the instrument which created the power provides that the appointment must be by will executed according to the law of the donee's domicile, to be proved and allowed there * * *."

New York neither controlled nor conferred the power of appointment exercised by the decedent, Eugene V. R. Thayer, and accordingly, may not claim the right to tax the transfer of the appointive property on the theory that it protected the privilege of exercising the power and transferring the property.

It is significant that the New York tax, moreover, is characterized as being upon the power to transfer property and upon nothing else. *Matter of Vanderbilt,* 281 N. Y. 297, 309, 311, 315 (1939); *Matter of Delano,* 176 N. Y. 486, 494 (1903); *Keeney* vs. *New York,* 222 U. S. 525, 537 (1912).

In this case, the decedent did not own the property and never did, nor can it be said that he was constructively the owner of it. *Farmers' Loan & Trust Co.* vs. *Mortimer,* 219 N. Y. 290, 295 (1916). The only attributes of ownership he had in the property (in his individual capacity) were the right to receive income during his lifetime and the right to dispose of the property at his death.

III. The fact that the decedent died a resident of New York is not sufficient to permit New York to tax the transfer of the appointive property.

The fact that a decedent dies a resident of a particular state is not of itself sufficient to permit the state of domicile to tax all the property which he owned at his death. For example, the state of residence may not tax the decedent's real property situated in another state nor his tangible property situated in another state. This was the unanimous opinion of the Supreme Court in *Frick* vs. *Pennsylvania, supra* and *Keeney* vs. *New York, supra.* The theory in such cases is that the state of domicile does not control the decedent's right of transfer of that property. As we have already pointed out, the decedent herein did not exercise the power of transfer by virtue of the laws of New York nor could the laws of New York, its courts or its legislature add anything to or detract anything from the validity of the exercise of that power.

The only relation of the State of New York to the appointive property was its right to tax the income as long as Mr. Thayer remained a resident of New York. This right, which it could tax during his lifetime, is not enough to permit the estate of the life beneficiary's domicile to tax the corpus of the trust. As was said by Mr. Justice Holmes in the unanimous decision of the United States Supreme Court in *Brooke* vs. *Norfolk,* 277 U. S. 27 (1928) in holding that the state of domicile of an income beneficiary cannot tax the corpus of the trust where another person is the donor of the trust:

> "the property is not within the State, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See *Wachovia Bank & Trust Co.* vs. *Doughton,* 272 U. S. 567, 575."

The appointive property in the case at hand was not within the possession or control of the decedent Thayer in his individual capacity. It was within the constructive possession and control of the Massachusetts Court. *Matter of Sandford*, 277 N. Y. 323 (1938); *Hutchins* vs. *Commissioner*, 272 Mass. 422, 172 N. E. 605 (1930).

Moreover, the decedent in this case had no rights in the appointive property comparable to those which he had with respect to his own real property and tangible personal property situated outside the State of New York. He was not the owner of the appointive property in any sense whatever, unlike the case where a person has a general power of appointment by deed or by will, as in *Bullen* vs. *Wisconsin*, 240 U. S. 625 (1916), or where he has created a trust reserving the right to income and a power of appointment by will, in which case his creditors may set aside the transaction even though it was executed before they extended the credit. Such a power in the creditors of a decedent is equivalent to property in the hands of the decedent—not only the income but also the principal can be reached during his lifetime.

> *Ward* vs. *Marie*, 73 N. J. Eq. 510, 68 Atl. 1084 (1907);
>
> *City Bank Farmers Trust Co.* vs. *Miller*, 163 Misc. 459 (1937), affirmed, 253 App. Div. 707, reversed on another point, 278 N. Y. 134 (1938).

As we have said, a *testamentary* power of appointment conferred by another person is not even constructively the equivalent of ownership of the property subject thereto and is not part of the true estate of the decedent. *Farmers' Loan & Trust Co.* vs. *Mortimer*, *supra* (219 N. Y. 290, 295); *United States* vs. *Field*, 225 U. S. 257 (1921). Not only is the property subject to a general testamentary power of appointment not even constructively owned by the donee, but it is not in any sense a source of wealth to the donee thereof. The separate opinion by Mr. Justice Holmes in the *Wachovia Bank* case is based upon a misconception of

this legal principle. Mr. Justice HOLMES did not dissent from the *Wachovia Bank* case, as is sometimes said. He simply outlined the case of *Bullen* vs. *Wisconsin* and then observed that in the *Wachovia Bank* case the power was equally a source of wealth, in his mind, as the power of appointment was to Bullen. He based this view upon his incorrect statement that "Mrs. Taylor, the donee, had the life interest and the power to dispose of the remainder by a will which she could bind herself to make". He then said that he could not help doubting whether the *Wachovia Bank* case could, therefore, be reconciled with the *Bullen* case. This was not a dissent and simply stated that Mr. Justice BRANDEIS and Mr. Justice STONE concurred "in this view". The reasoning of the "doubting" justices in the *Wachovia Bank* case lay in their belief that the power (a general *testamentary* power, not a power to appoint by deed or by will) could be validly contracted away and thereby operate as a source of wealth to the donee. It is well established both in New York and in Massachusetts that a contract to exercise a testamentary power of appointment in a particular way is invalid as a fraud upon the power and accordingly is unenforceable. *Farmers' Loan & Trust Co.* vs. *Mortimer, supra; Vinton* vs. *Pratt*, 228 Mass. 468, 117 N. E. 919 (1917); Gray, The Rule Against Perpetuities (3d ed. 1915), § 526c.

The power in the *Bullen* case was a general power of appointment by deed or by will. Even where given by a third person, such a power of appointment is the equivalent of ownership and has always been held to be so for all practical purposes. It is no different, in its essence, from a power of revocation retained by a donor of property. As Sugden said and was quoted as saying by Mr. Justice HOLMES in the *Bullen* case, this attempt to distinguish for practical purposes between a general power of appointment and a fee is to "grasp at a shadow while the substance escapes".

The case is quite different with a testamentary power of appointment for in such a case the donee of the power

has no right to the principal of the property and can never in any sense realize upon it. It is not property which he once owned and transferred, reserving the power, so that the transfer was in effect a transfer to take effect at death (*Curry* vs. *McCanless, Bullen* vs. *Wisconsin*), or so that his creditors can reach the principal of the trust. The reason for permitting the state of domicile to tax an *inter vivos* transfer which is for practical purposes not complete until the death of the donor is merely that the law will not permit the owner of an estate to defeat the plain provisions of the inheritance laws by any device which secures to him for life the income, profits, enjoyments and power of disposition thereof. Kidder, State Inheritance Tax and Taxability of Trusts (1934), page 143. The state which would otherwise be deprived of its inheritance tax is, of course, the state where the decedent is domiciled at his death.

If a state cannot validly tax a resident's real property or personal tangible property outside of its jurisdiction although that property is clearly a source of wealth to the decedent, *a fortiori*, it cannot tax property subject to a power of appointment whose exercise itcannot in any way control. In the one case the property is a source of wealth to the decedent but cannot be controlled by the state of domicile; in the case at hand the property not only cannot be controlled by the state of domicile but is not a source of wealth in any sense to the decedent except as a source of income. *Brooke* vs. *Norfolk, supra.*

The effect of a reversal in this case would be that a state may tax property which is not part of the true estate of its decedent or part of his wealth and the transfer of which it cannot prevent nor effect. The decedent Eugene V. R. Thayer was no richer and could have made himself no richer by reason of the power which he held than he would have been had he only had the right to receive the income of the trust during his life.

IV. *Curry* vs. *McCanless* and *Graves* vs. *Elliott* have in no sense overruled the *Wachovia Bank* case.

The *Wachovia Bank* case controls the case at hand, and has never been overruled either directly or indirectly, as the facts and the foregoing discussion reveal. In his opinion in the *Curry* case, Mr. Justice STONE cited the *Wachovia Bank* case as controlling and valid subsisting authority for a different proposition from that which he was considering in the *Curry* case. He did not cast any doubt upon the validity of the *Wachovia Bank* decision (307 U. S. at p. 371).

This was recognized by Mr. Surrogate FOLEY in his opinion below (R. 46), where he says:

> "In discussing this subject of jurisdiction in its recent decision in Curry *v.* McCanless (*supra*), Mr. Justice STONE wrote: 'Whether the appointee derives title from the donor under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee (Cf. Wachovia Bank & T. Co. *v.* Doughton, 272 U. S. 567, 71 L. ed., 413, 47 S. Ct., 202). There is no conflict here between the laws of the two states affecting the transmission of the trust property.'
>
> "Thus the court did not overrule its determination in the Wachovia Bank & Trust Company case, but cited it without distinguishment."

Moreover, the *Curry* case and the case of *Graves* vs. *Elliott*, 307 U. S. 383 (1939), established no principle of law not firmly established by unanimous decision of the Supreme Court before the time of the *Wachovia Bank* case:

The right of the state of domicile of the donee of a power of appointment created by himself had been established in *Bullen* vs. *Wisconsin*, a unanimous decision.

The right of the state of domicile of the settlor of a trust who reserved the right to revoke the trust had been established by a unanimous court in *Keeney* vs. *New York*.

The power to tax intangibles having a more or less permanent situs in the taxing state had also been recognized in *DeGanay* vs. *Lederer*, 250 U. S. 376, 382 (1919); see also *Safe Deposit and Trust Company* vs. *Virginia*, 280 U. S. 83 (1929), in which the validity of this doctrine was later accepted as beyond question.

It had already been established that where the donor and the donee were different persons but were domiciled in the same state, the state could tax the exercise of the power by the donee, on the theory that the state happened to control and confer the privilege of executing a will in the form necessary to exercise the power effectively. *Chanler* vs. *Kelsey, supra; Orr* vs. *Gilman, supra.*

Accordingly, there can be no contention that the *Curry* or *Graves* case established any principles of power of a state to tax the transfer of property by one of its residents beyond the power which had already been conceded to the states by the Supreme Court.

V. The decedent was, for the purposes of New York estate taxation, in no sense the owner of the appointed property, as claimed by the State Tax Commission.

The State Tax Commission contends that it is proper to subject to death taxation the property over which the decedent herein exercised the testamentary power of appointment given to him by the Will of his father, because it has been held proper to include in a decedent's gross estate, for the purpose of an estate tax, certain property which was not actually owned by a decedent, such as the proceeds of life insurance; property of which the decedent was a joint tenant; property of which the decedent was a tenant by the entirety; property held in a trust created by decedent over which he reserved a power of revocation.

In each of these cases, the property which was subjected to an estate tax had its origin in the decedent. The

proceeds of insurance were paid for by him. The joint tenancy and the tenancy by the entirety, represented an interest created by the decedent, and the trusts were created by the decedent. That is not the case here. Our decedent had a testamentary power of appointment over property held in a trust created by the Will of a non-resident decedent. He had no rights in this trust except the right to receive income during his lifetime and to appoint it by his Will. He was, in no sense, the owner of the property. *Sewell* vs. *Wilmer, supra.* The precise relationship of the donee of a power of appointment to the trust which gives him the power was set forth by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton, supra* (272 U. S. 567, 574-5), where the Massachusetts rule is stated as follows:

> "Except perhaps where the instrument which created the power provides that the appointment must be by will executed according to the law of the donee's domicile, to be proved and allowed there, the following propositions are established in Massachusetts: 'Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power.' The appointee takes, not as the legatee of him who appoints, but of the original donor. 'Property in the hands of domestic trustees appointed under the will of a domestic testator, who conferred a power of appointment upon a non-resident, must be distributed according to the law of this Commonwealth and * * * the execution of the power must be interpreted according to our law and in conformity to the power conferred.'"

VI. The contention of the New York State Tax Commission that intangibles subject to a testamentary power of appointment under a non-resident trust have the same status as intangibles owned by the decedent for the purpose of estate taxation in the state of the domicile of the decedent is not supported by the cases cited.

The State Tax Commission further contends that New York, as the State of the domicile of Eugene V. R. Thayer, has the power to impose an estate tax on the property subject to the testamentary power of appointment because intangibles owned by a decedent are taxable by the state of the domicile, wherever located; and to support this contention, the State Tax Commission cites the following cases:

Baldwin vs. *Missouri*, 281 U. S. 586 (1930);

Blodgett vs. *Silberman*, 277 U. S. 1 (1928);

Farmers' Loan & Trust Company vs. *Minnesota*, 280 U. S. 204 (1930);

First National Bank of Boston vs. *Maine*, 284 U. S. 312 (1932);

Beidler vs. *South Carolina Tax Commission*, 282 U. S. 1 (1930);

Graves vs. *Elliott*, 307 U. S. 383 (1939);

Curry vs. *McCanless*, 307 U. S. 357 (1939).

In each of these cases, except the last two, the intangibles that were subject to tax by the state of domicile were owned by the decedent but had their *situs* outside of the state of domicile in a broad sense.

In *Graves* vs. *Elliott*, *supra*, the decedent had set up a trust in the State of Colorado before moving to New York, where she was domiciled at the time of her death. This trust was revocable and the interest retained in the trust by the decedent was tantamount to a fee. Consequently

the property held in this trust was properly held to be a part of the taxable estate of the Settlor in New York.

In *Curry* vs. *McCanless, supra,* the decedent went out of her own state into another state and set up a trust there over which she retained full powers of management and also the power to dispose of the property in trust by will or by contract made by her during her lifetime.

In the case at bar, the decedent never owned the property which the State Tax Commission seeks to tax. The property was owned by his father and left in trust for him with a testamentary power of disposition in our decedent who had no power to dispose of this trust fund at any time during his lifetime and who had no power to make a contract with respect to its disposition. *Farmers' Loan & Trust Company* vs. *Mortimer, supra.*

The State Tax Commission also refers to *Whitney* vs. *State Tax Commission, supra,* as standing for the proposition that the appointive property is subject to estate taxation in New York. In that case, this Court upheld the inclusion in the taxable estate of a New York decedent of property subject to the exercise of a limited power of appointment. In that case, this Court overruled the contention that no tax was imposable because the donee of a limited power could not benefit himself. The case, however, is clearly distinguishable from the case at bar. In the *Whitney* case, the power of appointment had been created by the donee's ancestor, who was also a resident of the State of New York. In that case, the law of New York conferred upon the donee of the power the privilege of disposing of the property left in trust. In the case at bar, the law of New York has nothing to do with the privilege accorded to our decedent of disposing by will of the property left in trust by the Will of his father. Massachusetts law controls that privilege. *Sewall* vs. *Wilmer, supra.*

The State Tax Commission also claims that the fact that the State of New York did not confer upon the decedent in this case the privilege of disposing of the property held in trust under the Will of his father does not affect

the right of New York to subject the appointive property to New York estate tax because, they say, in the *Curry* case this Court justified the Tennessee tax by reason of benefits conferred upon the decedent, and her obligation to contribute to her state of domicile. Here again, the State Tax Commission ignores the important distinction between the case at bar and the *Curry* case. In the *Curry* case, the decedent went out of her own state and set up a trust which she still controlled and which she could dispose of by will or by contract during her lifetime. Furthermore, in the *Curry* case, the property was originally owned by the decedent. In the case at bar, Eugene V. R. Thayer never owned the appointive property and was never in a position to make that property his or to enjoy any right in the property except the right to the income of the property.

VII. The presence in the State of New York of the securities representing the intangible interests held in the trust fund did not confer upon New York the power to include the appointive property in the taxable estate of this decedent.

The petitioners say that when intangibles are brought by the owner within the protection of the laws of another state such other state may subject the intangibles to estate taxation. The only two cases involving estate tax which have been cited by the State Tax Commission are *Curry* vs. *McCanless, supra*, and *Graves* vs. *Elliott, supra*. In the *Curry* case the decedent went out of her own state and set up a trust which was subject to the laws of another state and the devolution of which was governed by the laws of the foreign state. Certainly this was a clear basis for the taxation of the trust fund in the foreign state. In *Graves* vs. *Elliott, supra*, a New York decedent had retained a power of revocation for a trust which she had established in Colorado and which was subject to the laws of Colorado and the

disposition of which was governed by the laws of Colorado. Here again there was a clear basis for the imposition of an estate tax on this trust fund by the foreign state.

The imposition of the tax in both of these cases in the foreign states bears out the contention of the respondent which is that an estate tax may properly be imposed by a state upon property whose devolution upon the death of the creator of the trust results from a privilege conferred by that state.

However, there is another reason why the presence of the securities held in this trust at the time of the death of the decedent does not form a basis for taxation under the New York Estate Tax Law. That reason is that the Constitution of the State of New York expressly prohibits the taxation of intangibles belonging to a non-resident or to a non-resident trust. Article XVI, Section 3 of the Constitution of the State of New York expresses the policy of the State in this regard. This Section reads as follows:

> "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

The Court of Appeals of the State of New York in considering the case at bar decided it on the broad ground that under the authority of the *Wachovia Bank & Trust*

Co. vs. *Doughton, supra,* and *Matter of Sandford, supra,* the principal of a non-resident trust over which a New York decedent exercised a testamentary power of appointment might not lawfully be included in the taxable estate of such New York decedent for the purposes of the New York Estate Tax. This is made clear from the holding of the Court of Appeals in *Matter of Sandford, supra,* where the facts were identical with those in the case at bar. There the decedent was a New York decedent. There the trust over which a power of appointment was given was a Massachusetts trust and in that case too the securities constituting the trust property were located in New York at the time of the death of the decedent. The trustee was a New York resident. That the Court of Appeals disregarded completely the presence of the securities of the Massachusetts trust within the State of New York at the time of the death of the New York decedent as a factor in determining whether the appointed property was subject to New York Estate Tax clearly appears at page 328, where the Court says:

> "The Winchester trust was created by a Massachusetts resident, the trustees are subject to the control of the Probate Court of that State, and all the securities constituting the *corpus* had an actual situs there except for one year prior to the death of the donee of the power and at present have at least a constructive situs there. The trustees' obligation is to account to the Massachusetts court. The actual presence in this State of the certificates or instruments evidencing the intangible property did not afford a basis for taxation. Neither did the removal of the residence of the trustee into this State afford a basis for the imposition of a tax. The transfer of the securities in the trust by the exercise of this power of appointment is not taxable in this State. (*Wachovia Bank & Trust Co.* v. *Doughton,* 272 U. S. 567.)"

The State Tax Commission also claims that the law of the State of New York controls the devolution of the appointive property in this case on the ground that it is

the law of the state having control of the property which governs its devolution, although for reasons of comity, the law of the donor's domicile is applied, and they cite *Bullen* vs. *Wisconsin, supra, Frick* vs. *Pennsylvania, supra,* and the very recent case of *Riley* vs. *New York Trust Company,* 10 U. S. L. WEEK. 4197 (U. S. 1942).

None of these cases stands for this proposition. In *Bullen* vs. *Wisconsin,* Mr. Justice HOLMES made a reference to the *universitas* in connection with the taxation of a trust fund at the domicile of the decedent. In *Frick* vs. *Pennsylvania,* tangible personal property was involved; and in *Riley* vs. *New York Trust Company,* there was no question of comity involved. The question before the Court in the *Riley* case was whether or not a determination made in Georgia was binding on a New York personal representative who did not appear in the Georgia litigation and whether the state of incorporation of a corporation might make a determination as to the domicile of the owner of shares of stock of that corporation although the stock certificates themselves were actually present in another state where the question of domicile had already been decided.

It was clearly the opinion of this Court in *Wachovia Bank & Trust Co.* vs. *Doughton, supra,* that it is the law of the domicile of the creator of a testamentary power of appointment which governs the devolution of the property subject to the power of appointment. At page 575, Mr. Justice MCREYNOLDS said:

> "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the state where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina."

Conclusion.

The rule laid down by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton,* 272 U. S. 567, and followed by

the Surrogate's Court of New York County in excluding from the decedent's gross estate the value of the intangible personal property held in the Massachusetts trust and passing under the power of appointment exercised by the decedent, should be applied and the judgment of the Court of Appeals of the State of New York affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 604.—October Term, 1941.

Mark Graves, John P. Hennessey and Joseph M. Mesnig, as Commissioners, Constituting the State Tax Commission of the State of New York, Petitioners,
vs.
Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors of the Last Will and Testament of Eugene V. R. Thayer, Deceased.

On Writ of Certiorari to the Surrogate's Court of the County of New York, State of New York.

[March 30, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

We are asked to say whether the due process clause of the Fourteenth Amendment precludes New York from taxing the exercise, by a domiciled resident, of a general testamentary power of appointment of which he was the donee under the will of a resident of Massachusetts, the property appointed being intangibles held by trustees under the donor's will.

Respondents' decedent died a resident of New York, where his will was probated and letters testamentary were issued. Decedent's father had previously died a resident of Massachusetts, where his will had been probated. By his will the father bequeathed his residuary estate in trust to divide the trust fund into as many shares as he should leave children surviving. To his son, the New York decedent, he gave a life estate in one share and a general power to dispose of that share "by will".

The son was also one of the three testamentary trustees. For some years they managed the trust property as a single trust fund, but in 1911 his one-third share was segregated and he was permitted by the other trustees to manage it as a separate trust, although all continued as trustees and as such accounted to the Massachusetts Probate Court for the administration of his share of the fund. From 1918 to 1929 the New York decedent resided

in New York; from then until 1934 he resided in Illinois, when he returned to New York where he resided until his death in 1937. Throughout he kept in the state of his residence the paper evidences of the intangibles comprising his share of the trust. At the time of his death it consisted wholly of receivables and corporate stocks and bonds. By his will decedent appointed his share of the trust fund to his widow, and the New York tax authorities in computing the tax included in the decedent's gross estate the intangibles bequeathed to her under the power.

Article 10-C of the New York tax law, by § 249-n, imposes an estate tax "upon the transfer of the net estate" of resident decedents. Under this statute the net taxable estate is arrived at by deducting from the gross estate, as defined by § 249-r, the specified deductions allowed by § 249-s. Section 249-r, so far as relevant, provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .

"7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will . . ."

An order of the New York Surrogate's Court, 172 Misc. 426, reduced the estate tax assessed against the decedent's estate by excluding from his gross estate the share of the trust fund passing to the widow by the exercise of the power, on the ground that the state was without constitutional authority to tax the exercise by a resident donee of a power of appointment created by a nonresident donor, citing *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567. The New York Court of Appeals affirmed the order without opinion, but certified by its remittitur that it held that the taxing statute as sought to be applied in this proceeding violates the Fourteenth Amendment. We granted certiorari, 314 U. S. —, because of the importance of the question presented.

For purposes of estate and inheritance taxation the power to dispose of property at death is the equivalent of ownership. *Buller* v. *Wisconsin*, 240 U. S. 625; *Whitney* v. *Tax Comm'n.*, 309 U. S. 530, 538; see Gray, Rule Against Perpetuities, 3d ed. 1916, § 524. It is a potential source of wealth to the appointee. The disposition of wealth effected by its exercise or relinquishment at death is one form of the enjoyment of wealth and is an appropriate subject of taxation. The power to tax "is an incident of sovereignty and

is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation". *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. Intangibles, which are legal relationships between persons and which in fact have no geographical location, are so associated with the owner that they and their transfer at death are taxable at the place of his domicile where his person and the exercise of his property rights are subject to the control of the sovereign power. His transfer of interests in intangibles, by virtue of the exercise of a donated power instead of that derived from ownership, stands on the same footing. In both cases the sovereign's control over his person and estate at the place of his domicile and his duty to contribute to the financial support of government there, afford adequate constitutional basis for the imposition of a tax. *Curry* v. *McCanless*, 307 U. S. 357; cf. *Graves* v. *Elliott*, 307 U. S. 383.

These were not novel propositions, when they were restated in the *McCanless* and *Elliott* cases,[1] and they were challenged then, though unsuccessfully, only on the ground that the transfer of the intangibles was subject to taxation in another state where they were held in trust. But the contention that the due process clause forecloses taxation of an interest in intangibles by the state of its owner when they are held in trust in another state was rejected in *Bullen* v. *Wisconsin*, *supra*. In that case a fund had been given in trust reserving to the donor a general power of revocation and the disposition of the trust income during life. This Court held that upon his death an inheritance tax could be levied by the state of his domicile although the trustee and the trust fund were outside the state.

In numerous other cases the jurisdiction to tax the use and enjoyment of interests in intangibles regardless of the location of the paper evidences of them, has been thought to depend on no factor other than the domicile of the owner within the taxing state. And it has been held that they may be constitutionally taxed there even though in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose

[1] See Orr v. Gilman, 183 U. S. 278; Chanler v. Kelsey, 205 U. S. 466; Bullen v. Wisconsin, 240 U. S. 625; Saltonstall v. Saltonstall, 276 U. S. 260, 271; cf. Reinecke v. Northern Trust Co., 278 U. S. 339, 345; Chase National Bank v. United States, 278 U. S. 327, 337; Tyler v. United States, 281 U. S. 497, 503; Porter v. Commissioner, 288 U. S. 436, 444.

legal protection they enjoy.[2] And such interests taxable at the domicile of the owner have been deemed to include the exercise or relinquishment of a power to dispose of intangibles. *Chanler* v. *Kelsey*, 205 U. S. 466; *Bullen* v. *Wisconsin*, *supra*; *cf. Orr* v. *Gilman*, 183 U. S. 278; *Saltonstall* v. *Saltonstall*, 276 U. S. 260.

Decedent's complete and exclusive power to dispose of the intangibles at death was property in his hands in New York, where he was domiciled. *Graves* v. *Elliott*, *supra*. He there made effective use of the power to bestow his bounty on the widow. Its exercise by his will to make a gift was as much an enjoyment of a property right as would have been a like bequest to his widow from his own securities. See *Helvering* v. *Horst*, 311 U. S. 112, 117. For such enjoyment of property rights, through resort to New York law, decedent was under the highest obligation to contribute to the support of the government whose protection he enjoyed in common with other residents. Taxation of such enjoyment of the power to dispose of property is as much within the constitutional power of the state of his domicile as is the taxation of the transfer at death of intangibles which he owns.

Since it is the exercise of the power to dispose of the intangibles which is the taxable event, the mere fact that the power was acquired as a donation from another is without significance. We can perceive no ground for saying that its exercise by the donee is for that reason any the less the enjoyment of a property right, or any the less subject to taxation at his domicile. The source of the power by gift no more takes its exercise by the donee out of the taxing power than the like disposition of a chose in action or a share of stock, ownership of which is acquired by gift.

But respondents argue that because here the power was bequeathed by a Massachusetts will, which placed the intangibles subject to the power in a Massachusetts trust, there was nothing within the jurisdiction or control of New York which could be deemed subject to its taxing power. If by this is meant that the

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[2] See Kirtland v. Hotchkiss, 100 U. S. 491; Hawley v. Malden, 232 U. S. 1; Cream of Wheat Co. v. Grand Forks, 253 U. S. 325; Blodgett v. Silberman, 277 U. S. 1; Virginia v. Imperial Coal Sales Co., 293 U. S. 15; First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 239-40, and cases cited; Stewart v. Pennsylvania, 338 Pa. 9, affirmed 312 U. S. 649; *cf.* Carpenter v. Pennsylvania, 17 How. 456 (before Fourteenth Amendment); also Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204; Baldwin v. Missouri, 281 U. S. 586; Beidler v. South Carolina, 282 U. S. 1 (all recognizing the power of the state of domicile to tax). In the case of income taxation see Lawrence v. State Tax Comm'r., 286 U. S. 276; New York *ex rel.* Cohn v. Graves, 300 U. S. 308; Guaranty Trust Co. v. Virginia, 305 U. S. 19.

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power was ineffective because its exercise by the New York will did not conform to the requirements of the will creating the power and defining the manner of its exercise, or to the laws of Massachusetts governing the disposition of intangibles, no such question is before us. We must take it that the New York courts assumed, as we do, that the power had been so exercised by the New York will as to confer on the widow the right to demand the property of the trustees in Massachusetts, and that even upon that assumption they held that the exercise of the power in New York could not constitutionally be taxed.

Whether the New York tax statute would apply if the New York will were ineffective to transfer the intangibles because it failed to comply with the requirements of the Massachusetts will or statutes, is for the New York courts to decide. Whether in such a case the statute could be constitutionally so applied is a question not presented by the record. But if, as is assumed, the power has been effectively exercised, the New York will is the implement of its exercise, made effective as a will by New York law whose aid the decedent invoked for the exercise and enjoyment of the property right conferred on him by the Massachusetts will. Its exercise is a subject over which the sovereign power of taxation extends.

Admittedly, under prevailing notions of choice of law in the courts of these two states, the law of the donor's domicile, here Massachusetts, may be looked to in New York in determining whether, in some respects at least, there has been a valid and effective execution of the power of appointment. *Sewall* v. *Wilmer*, 132 Mass. 131; *Hogarth-Swann* v. *Weed*, 274 Mass. 125, 130; *Hillen* v. *Iselin*, 144 N. Y. 365, 378; *In re New York Life Ins. & Trust Co.*, 209 N. Y. 585. But a transfer which has in fact been effected by recourse in part to the law of New York is not free of taxation there because the power might have been exercised elsewhere or by some other mode, or because it may be necessary for the transferee to invoke the laws of Massachusetts in order to acquire control of the property. A transfer in one state of a chose in action or a share of stock may be taxed there even though the transferee in order to enjoy its benefits must depend in part upon the law of the state of the debtor or of the corporation. *Blodgett* v. *Silberman*, 277 U. S. 1, 10-17. Here the relationship of the power to Massachusetts does not leave New York without sufficient control over the donee and his exercise of the power to support its con-

stitutional authority to tax. For the fact remains that he as a resident, enjoying the protection of New York's laws and owing to it the duty of financial support, has disposed of wealth by a will executed and probated in New York with the same result as if he had owned the property. This transmission of wealth at death by a resident is not a forbidden source of revenue to the state. *Wachovia Trust Co.* v. *Doughton, supra,* on which respondents rely, denied the constitutional power of a state to tax the effective exercise of a testamentary power in circumstances like the present. The only grounds for the decision were that the intangibles held in trust in another state, which were the subject of the power, had no situs in the state where the domiciled testator had exercised the power by his will; that its exercise was subject to the laws of Massachusetts where the will donating the power and establishing the trust had been probated, and that no "right" exercised by the donee was conferred by the state of his domicile where it was exercised.

The conclusion there reached and the reasons advanced in its support cannot be reconciled with the decision and the reasoning of the *Bullen,* the *McCanless* and the *Elliott* cases. It is plain that if appropriate emphasis be placed on the orderly administration of justice rather than blind adherence to conflicting precedents, the *Wachovia* case must be overruled. There is no reason why the state should continue to be deprived of revenue from a subject which from the beginning has been within the reach of its taxing power; a subject over which we cannot say the state's control has been curtailed by the due process clause of the Fourteenth Amendment. No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution. See *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406, footnote 1; and cf. *Helvering* v. *Mountain Producers Corporation,* 303 U. S. 376, 387. The *Wachovia* case should be and now is overruled and the constitutional power of New York to levy the present tax is sustained.

Reversed.

Mr. Justice ROBERTS concurs in the result only because he considers himself bound by the decisions in *Curry* v. *McCanless,* 307 U. S. 357 and *Graves* v. *Elliott,* 307 U. S. 383. Otherwise he would vote to affirm.